

No. 90-5721-CSY
Status: GRANTED
CAPITAL CASE

Title: Pervis Tyrone Payne, Petitioner
v.
Tennessee

Docketed: September 12, 1990 Court: Supreme Court of Tennessee,
Western Division

Counsel for petitioner: Lathram, J. Brooke

Counsel for respondent: Burson, Charles W.

Entry	Date	Note	Proceedings and Orders
1	Jun 28 1990	G	Application (A90-2) to extend the time to file a petition for a writ of certiorari from July 15, 1990 to September 13, 1990, submitted to Justice Scalia.
2	Jun 29 1990		Application (A90-2) granted by Justice Scalia extending the time to file until September 13, 1990.
3	Sep 12 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Oct 15 1990		Brief of respondent Tennessee in opposition filed.
6	Oct 18 1990		DISTRIBUTED. November 2, 1990
7	Feb 1 1991		REDISTRIBUTED. February 15, 1991
9	Feb 15 1991		Petition GRANTED. In addition to the questions presented by the petition, the parties are requested to brief and argue whether Booth v. Maryland, 482 U. S. 496 (1987), and South Carolina v. Gathers, 490 U. S. 805 (1989), should be overruled. The petitioner's opening brief is to be served and filed with the Clerk on or before March 18, 1991. Respondent's brief is to be served and filed with the Clerk on or before April 8, 1991. The case is set for oral argument during the April Session. Justice Stevens, with whom Justice Marshall and Justice Blackmun join, dissenting: In my opinion, the Court's decision to expedite the consideration of this case and to ask the parties to address whether we should overrule Booth v. Maryland, 482 U. S. 496 (1987) and South Carolina v. Gathers, 490 U. S. 805 (1989), a question presented neither in the petition for certiorari nor in the response, is both unwise and unnecessary. Cf. Patterson v. McLean Credit Union, 485 U. S. 617, 622-623 (1988) (Stevens, J., dissenting). Moreover, the Court's decision to review the alleged Booth error in this case would be inappropriate in any event because the decision below rested alternatively on the ground that any Booth violation that might have occurred was harmless beyond a reasonable doubt. See State v. Payne, 791 S.W. 2d 10, 19 (Tenn. 1990). Accordingly, I respectfully dissent.
10	Feb 15 1991		*****
11	Feb 27 1991		REDISTRIBUTED. February 22, 1991
12	Mar 8 1991		SET FOR ARGUMENT WEDNESDAY, APRIL 24, 1991. (1ST CASE)
15	Mar 14 1991	G	Joint appendix filed.
			Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Entry	Date	Note	Proceedings and Orders
13	Mar 15 1991		Brief of petitioner Payne filed.
14	Mar 18 1991		Brief amicus curiae of Southern Christian Leadership Conference filed.
16	Mar 22 1991		CIRCULATED.
17	Mar 25 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
18	Mar 27 1991		Record filed. * one vol., -Supreme Court of TN
20	Apr 4 1991	X	Brief amici curiae of Alabama, et al. filed.
19	Apr 5 1991	X	Brief of respondent Tennessee filed.
28	Apr 5 1991	X	Brief amicus curiae of Criminal Justice Legal Foundation filed.
21	Apr 8 1991	X	Brief amici curiae of Hon. Thomas J. Bliley, Jr., et al. filed.
22	Apr 8 1991	X	Brief amici curiae of Washington Legal Foundation, et al. filed.
23	Apr 8 1991	X	Brief amici curiae of Justice for All Political Committee, et al. filed.
24	Apr 8 1991	X	Brief amicus curiae of United States filed.
25	Apr 8 1991	X	Brief amicus curiae of California District Attorneys Assn. filed.
26	Apr 8 1991	X	Brief amici curiae of National Organization for Victim Assistance, et al. filed.
27	Apr 15 1991	X	Reply brief of petitioner Payne filed.
29	Apr 24 1991		ARGUED.

90-5721 (8)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

No. _____

PERVIS TYRONE PAYNE,

Petitioner,

VS.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF TENNESSEE

J. Brooke Lathram, Esq.
BURCH, PORTER & JOHNSON
130 North Court
Memphis, Tennessee 38103
(901) 523-2311

Attorney for Petitioner

45 pp

TABLE OF CONTENTS

Opinion Below	1
Jurisdiction	1,2
Constitutional and Statutory Provisions Involved	3
Statement of the Case.	4
Reasons for Granting the Petition	
I. The introduction of a video tape of a homicide scene made more than one hour after the offense violated petitioner's rights under the Eighth and Fourteenth Amendments by preventing the jury from making a reasoned, moral decision on whether to impose the death penalty.	16
II. The introduction of victim impact evidence, when combined with the statements and conduct of the Assistant District Attorney General for the State of Tennessee, denied Petitioner's rights under the Eighth and Fourteenth Amendments.	24
III. The jury instruction imposing upon petitioner the burden of proving that the mitigating evidence outweighed the aggravating circumstances deprived petitioner of his right to have the jury make the individualized determination required by the Eighth and Fourteenth Amendments.	33
Conclusion	38
Certificate of Service	39
Appendix A	4
Appendix B	4,7,8
Appendix C	4
Appendix D	13
Appendix E	14

TABLE OF AUTHORITIES

Cases

<u>Blyestone v. Pennsylvania</u> , 494 U.S. ____, 110 S.Ct. 1978 (1990)	33,37
<u>Booth v. Maryland</u> , 482 U.S. 496, 107 S.Ct. 2529 (1987)	5,22,24,25,26 27,28,29,31
<u>Boyde v. California</u> , 494 U.S. ____, 1190 (1990)	33,34,35,37
<u>Caldwell v. Mississippi</u> , 472 U.S. 320, 105 S.Ct. 2633 (1985)	21
<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824 (1967)	29,30
<u>Eddings v. Oklahoma</u> , 455 U.S. 104, 102 S.Ct. 869 (1982)	19,21,22
<u>Estelle v. Smith</u> , 451 U.S. 454, 101 S.Ct. 1866 (1981)	30
<u>Gray v. Mississippi</u> , 481 U.S. 648, 107 S.Ct. 2045 (1987)	29,30
<u>Griffith v. Kentucky</u> , 479 U.S. 314, 107 S.Ct. 708 (1987)	5,24
<u>Lockett v. Ohio</u> , 438 U.S. 586, 98 S.Ct. 2754 (1987)	21
<u>Penry v. Lynaugh</u> , 492 U.S. ____, 109 S.Ct. 293 (1989)	19
<u>Satterwhite v. Texas</u> , 486 U.S. 249, 108 S.Ct. 1792 (1988)	30,31,32
<u>Smith v. North Carolina</u> , 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982)	36
<u>South Carolina v. Gathers</u> , 490 U.S. ____, 109 S.Ct. 2207 (1989)	5,22,24,25,27 29,31,32

State of Tennessee v. Payne, 791 S.W.2d 10 (1990) . . . 1,13,14,15
27,28

Walton v. Arizona, ____ U.S. ___,
110 S.Ct. 3047 (1990) 33,37

Woodson v. North Carolina, 428 U.S. 280,
96 S.Ct. 2978 (1976) 21,33,35

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

No. _____

PERVIS TYRONE PAYNE,

Petitioner,

Statutes and Court Rules

Tenn. Code Ann. 39-2-203 (1987 Supp.) 4,7,8,18,35

Tenn. Code Ann. 39-13-204(g)(2)(B) (1990 Supp.) 4

Tennessee Rule of Criminal Procedure 30(C) 13

(c) Character Use and Disposition of Instructions.

In the trial of all felonies except where pleas of guilty have been entered, every word of the judge's instructions shall be reduced to writing before being given to the jury. The written charge shall be read to the jury as it shall be taken to the jury room by the jury when it retires to consider its verdict. The jury shall have possession of the written charge during its deliberations; and after the jury's deliberations have been concluded, the written charge shall be returned to the judge and filed with the record, but need not be copied into the minutes.

Federal Rule of Evidence 403 18

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF TENNESSEE

Petitioner, Pervis Tyrone Payne, respectfully prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Tennessee entered on the 16th day of April, 1990.

OPINION BELOW

The opinion of the Tennessee Supreme Court is reported at 701 S.W.2d 10 (1990) (Appendix A).

JURISDICTION

The judgment of the Tennessee Supreme Court was entered on April 16, 1990. There was no petition for rehearing. Petitioner requested by motion an extension of time in which to file this

petition, and Justice Scalia, on June 28, 1990, signed an order extending petitioner's time to file this petition to and including September 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

The Eighth Amendment of the United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment of the United States Constitution:

Section 1. All persons born unnaturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Tenn. Code Ann. 39-2-203 (1987 Supp.) 4,7,8,18,35

Tenn. Code Ann. 39-13-204(g)(2)(B) (1990 Supp.) 4

STATEMENT OF THE CASE

QUESTIONS PRESENTED

I.

Whether the introduction of a video tape of a homicide scene made more than one hour after the offense violated petitioner's rights under the Eighth and Fourteenth Amendments by preventing the jury from making a reasoned, moral decision on whether to impose the death penalty?

II.

Whether the introduction of victim impact evidence, when combined with the statements and conduct of the Assistant District Attorney General for the State of Tennessee, denied Petitioner's rights under the Eighth and Fourteenth Amendments.

III.

Whether a jury instruction imposing upon petitioner the burden of proving that the mitigating evidence outweighed the aggravating circumstances deprived petitioner of his right to have the jury make the individualized determination required by the Eighth and Fourteenth Amendments.

Pervis Payne, a twenty year old, border-line retarded black man, with no previous criminal record, was sentenced by a jury to death pursuant to an instruction that imposed upon him the burden of proving that mitigating evidence outweighed the aggravating circumstances of the offense. The effect of this instruction was to prevent the jury from making an individualized determination of whether death was the appropriate penalty under all of the circumstances. The Tennessee statute¹ that authorized this jury instruction was repealed and amended, effective November 1, 1989.²

Petitioner's sentence was imposed by the jury after it heard proof offered by both the prosecution and petitioner during the sentencing portion of petitioner's bifurcated trial. The only proof offered by the prosecution during the sentencing phase

¹Tenn. Code Ann. 39-2-203(g) (1987 supp.) (Appendix B).

²The statute was replaced by a new death penalty statute, which requires that the jury "unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances." Tenn. Code Ann. 39-13-204(g)(2)(B). (Appendix C).

The new statute no longer requires the defendant to prove that the mitigating circumstances outweigh the aggravating circumstances. More importantly, under the former statute, if the aggravating circumstances were equal to the mitigating circumstances, the jury was required to return a sentence of death. Under the new statute, before returning a sentence of death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances; therefore, if the mitigating and aggravating circumstances are in equipoise, the jury would be required to return a sentence of less than death.

consisted of (1) a video tape of the crime scene that was so inflammatory that the trial judge indicated that it would not have been admissible in the guilt phase of petitioner's trial (T.1493-94) and (2) victim impact evidence of precisely the type that was condemned by this Court in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, (1987) and South Carolina v. Gathers, 490 U.S. ___, 109 S.Ct. 2207 (1989).³ In addition, the prosecution supported its case for the death penalty with an argument that highlighted the victim-impact aspects of the offense and that invited the jury to draw inferences about the victim impact for which there were no evidentiary support.

Petitioner was convicted of the first degree murder of Charisse A. Christopher, a 28 year-old white woman, and her two year old daughter, Lacie Jo Christopher, and of the assault with intent to commit murder in the first degree of Nicholas Christopher, Mrs. Christopher's three year old son. All three victims received multiple stab wounds.

Petitioner pled not guilty to all charges. At trial, the prosecution established, as part of its case-in-chief, petitioner's presence at the scene. Testifying on his own behalf, petitioner admitted being in the victims' apartment shortly before the offense, but denied that he had stabbed the victims. Petitioner testified that, on his way to his girlfriend's apartment, located

³Although petitioner's trial was more than a year before this Court's decision in Gathers, these decisions (Booth and Gathers) should apply retroactively following this Court's holding in Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987).

on the same floor as that of the victims, he passed an unidentified black man descending the steps from the victims' apartment. Petitioner further testified that the door to the Christopher apartment was ajar and that he heard a baby crying inside. When he entered the apartment, he found Charisse Christopher with a knife protruding from her throat (T.1215-1222).

The prosecution presented evidence from which the jury could conclude that petitioner had been in the victims' apartment prior to the stabbings; that petitioner had earlier that day purchased and injected cocaine (T.889-890); and that he committed the attacks as part of a drug-induced frenzy that may have, at least in part, been sexually motivated (T.691).

At the conclusion of the guilt phase of the trial, the jury found petitioner guilty as charged (T.1485-87). The jury then retired to the jury room before the sentencing phase. Out of the presence of the jury, just prior to the commencement of the sentencing hearing, the prosecution requested permission to introduce a video tape of the crime scene that had been taken over an hour after the discovery of the crime (T.1489).⁴ (Exact copies of the video tape have been included as Exhibit 1 to this petition.) The prosecution argued that the tape was relevant to show the heinous, atrocious, and cruel nature of the offense (T.1490). The commission of an offense in a manner fitting this

⁴ The record indicates that Officer C.E. Owen received a call at 3:23 p.m. informing him of a disturbance at 4516 Biloxi Street, Millington, Tennessee, the apartment of the victims (T.670). As the tape itself indicates, it was not made until 4:26 p.m.

description is one of the aggravating factors that, under the then-applicable Tennessee statute,⁵ required the jury to impose the death penalty unless the defendant proved to the jury's satisfaction that the aggravating factor was outweighed by mitigating evidence. Petitioner's trial counsel objected on the grounds that the tape was "simply an inflammatory color photograph" of the scene, which the jury had already seen through black-and-white photographs introduced during the guilt phase (T.1491), and that it should not be shown to the jury "because of its highly inflammatory effect" (T.1492).

After viewing the tape, the trial judge ruled it admissible (T.1493-94). The trial judge indicated that the tape would not have been admissible during the guilt phase due to its inflammatory nature; however, he felt that Tennessee's death penalty statute commanded him to admit, in the sentencing phase, any evidence that had any probative value whatsoever (T.1493-94).⁶

⁵Tenn. Code Ann. § 39-2-203 (Appendix B).

⁶The portion of the statute to which the trial court referred is Tenn. Code Ann. § 39-2-203(c), which provided:

In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so

At the sentencing hearing, the prosecution, prior to showing the tape, offered the brief, but emotional, testimony of Mary Zvolanek, the mother and grandmother of the victims. Ms. Zvolanek testified that the deaths of his mother and sister had had a devastating effect upon Nicholas:

Q. Ms. Zvolanek, how has the murder of Nicholas' mother and his sister affected him?

A. He cries for his mother. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell him Yes. He says, I'm worried about my Lacie (T-1504-05).

The prosecution then concluded its proof with the display of the first two minutes of the video tape (T.1507).⁷ The tape exhibited by the prosecution showed the crime scene, including the bodies of the two dead victims. Charisse's hands and face revealed the effects of rigor mortis, and the tape focused on these particular features for several seconds at a time, sometimes with "close-ups." More particularly, the tape shows, in sequence, a wide angle shot of Charisse and Lacie Christopher lying on the floor in a pool of blood; approximately a five second close-up of

admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Tennessee (Appendix B).

⁷The prosecution chose not to show the remainder of the tape because, in the prosecution's view, only the first two minutes of the tape were relevant to the sentencing issue (T.1490-91).

Charisse's blood soaked body with emphasis on the puncture marks in her clothing; and a close-up (approximately five seconds) of Lacie, emphasizing her eyes and the puncture mark in her back. The tape then shows the wall and kitchen appliances covered with blood. Then it focuses back on Charisse with emphasis upon the effects of death (rigor mortis, swollen limbs, open mouth and eyes). Finally, the tape returns to Lacie, emphasizing the vivid contrast between the large knife and her small foot.

The prosecution's dramatic reference to the tape in closing argument sought to connect the victims' features, as depicted in the film, with the "depravity" of the conduct:

Now the first two minutes of video tape wasn't just shown because it's in color and looks a whole lot more gory. It's because it shows more detail and more accurately what we're talking about in the first stage of the trial. And while, perhaps I couldn't refer to it in voir dire, you remember when I asked you in voir dire could you listen to that kind of proof, that you were going to hear some rather graphic evidence of wounds. Well, that's what I was talking about.

You see, because that's not something I want to spring on somebody without warning them on the front end, even though it was a week ago. Because it shows very graphically how atrocious this crime was, how cruel it was, and how much depravity it showed. Some of the details especially in that picture -- in that videotape, you can't see as well as in the black and white picture. For instance, Charisse's right hand all gnarled up in agony. And Lacie Jo's hand and Lacie Jo's eyes and the expression on her face some people refer to as the thousand yard stare because it's

just sort of not focused (T.1574-75) (emphasis added).⁸

No foundation had been laid, of course, for the argument that Charisse's "gnarled" hand reflected her "agony" at death or that the expression on the child's face was relevant to show the nature of the killing.

The jury had previously, during the guilt phase, learned of the number and location of each victim's stab wounds, seen photographs of the deceased victims, and heard from the surgeon who operated on Nicholas a detailed description of the boy's life-threatening wounds. To the extent, therefore, that the results of the offense were relevant to show the heinousness, cruelty and depravity with which the killer acted, those results had been amply demonstrated by evidence other than the tape.

Following the display of the tape, the prosecution rested, and it thus became petitioner's task, in order to save his life, to offer mitigating evidence that outweighed the aggravating circumstances. He offered evidence that he had no prior record; that he had been a hard and diligent worker; and that he had never been a trouble maker in school. Petitioner also called a clinical psychologist, who testified as to petitioner's low I.Q. scores, which he considered "significant." He would not, however, describe petitioner as "retarded," indicating that "retardation" is "not commonly used any more." He described petitioner as one of the

⁸The first emphasized portion shows that the prosecution realized that the tape was inadmissible during the guilt phase.

most polite prisoners that he had ever interviewed (T.1508-30, 1551-71).

As previously noted, the prosecution, in its closing argument, invoked the grisly images depicted in the video tape. The prosecution also pointedly argued to the jury that it should consider the impact of the killings on the surviving child, Nicholas:

But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and to his Baby Sister. (T.1576)

* * *

There obviously is nothing you can do for Charisse or Lacie Jo. But there is something you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer. (T.1581)

On rebuttal to the argument by petitioner's counsel, the prosecution argued:

You saw the video tape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come to your mind, probably through the rest of your lives (T. 1591).

* * *

No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no, there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there - There won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby (T.1592-93).

* * *

Mr. Garts wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who love her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why is it especially cruel, heinous, and atrocious, the burden that that child will carry forever (T.1594-95).

* * *

The prosecutor subsequently argued the value of the lost lives of Charisse and Lacie Jo:

Mr. Garts says but Pervis Payne has lived an exemplary life for twenty years. Well, what about Charisse, for twenty-eight years? What about Lacie Jo, for two years? They lived exemplary lives (T. 1596-97).

Having based its arguments (opening and rebuttal) almost entirely on the video tape and the victim impact evidence, the prosecution concluded with the following remarks:

Ladies and Gentlemen of the jury this is the last thing I am going to say to you. But I want you to think about this when you go back into your jury room. We have heard

a lot about Charisse Christopher, Lacie Jo and Nicholas, and here they were as it appeared before Pervis Payne came into their lives. And this is what he did to them.

The Assistant District Attorney General then approached a large diagram of Nicholas Christopher's body and stabbed a hole through it with the butcher knife that was found at the crime scene. See State of Tennessee v. Payne, 791 S.W.2d 10, 20 (1990).

Following closing arguments, the trial judge instructed the jury on the criteria for imposing the death penalty (T.1597-1600) (Appendix D):⁹

If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the State, beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. The jury shall state in writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify in writing that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found (emphasis added).

* * *

If you unanimously determine that no statutory aggravating circumstance has been proved by the State beyond a reasonable doubt; or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt; but that said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. ... (Appendix D) [emphasis added].

⁹In accordance with Tennessee Rule of Criminal Procedure 30(c), the trial judge first gave the instructions orally from the bench and subsequently submitted them to the jury in writing for use during the jury's deliberation (Appendix D).

The verdict form submitted to the jury required the jury to identify any aggravating circumstances that it found. As returned by the jury, the verdict stated:

1. The murder was committed against a person less than twelve years of age and the defendant was fourteen years of age or older.
2. The defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder.
3. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

(Appendix E)

Following the space provided for identification of aggravating circumstances, the form stated:

We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstances or circumstances so listed above (Appendix E).

The Tennessee Supreme Court, in its opinion affirming petitioner's conviction and sentence, held that the admission of the video tape was not error. In that court's view, the tape was relevant to show that the murder was heinous, atrocious or cruel, and, in any event, its probative value outweighed any prejudicial effect. 791 S.W.2d at 19-20 (1990).

The court also held that Mrs. Zvolanek's testimony about the effect that the deaths of Nicholas' mother and sister had had upon him, while technically irrelevant, "did not create a

constitutionally unacceptable risk of an arbitrary imposition of the death penalty," and thus was harmless error. 791 S.W.2d at 17,

18. The court further ruled that the victim impact arguments made by the State during the sentencing phase were relevant to show petitioner's personal responsibility and moral guilt. The court's decision, the rationale for which is set forth in the following passage, is in direct conflict with this Court's decisions in Booth and Gathers:

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims. 791 S.W. 2d at 19.

Though the court had harsh words for the prosecution's improper stabbing of the diagram, it held that this conduct was harmless error. 791 S.W.2d at 20.

REASONS FOR GRANTING THE PETITION

- I. The introduction of a video tape of a homicide scene made more than one hour after the offense violated petitioner's rights under the Eighth and Fourteenth Amendments by preventing the jury from making a reasoned, moral decision on whether to impose the death penalty.

Although we have attempted to describe what is depicted on the video tape (supra, p. 14-15), words really cannot impart its effect upon the viewer. Its horrifying impact can only be realized through viewing it. The tape, in effect, transported the jury to the Christophers' apartment one hour after the stabbing. A juror following the movement of the camera could not have helped but get the eerie feeling that he or she was standing in the room with the victims. Shortly after their "walk" through the apartment, the jury was called upon to decide whether petitioner should live or die.

Our argument necessarily consists of two parts. First, we explain that the tape should never have been admitted into evidence. Second, we show that the introduction of the tape violated petitioner's rights under the Eighth and Fourteenth Amendments.

A. The Video Tape Was Inadmissible.

The video tape was inadmissible for two reasons. First, it was not relevant for the purpose for which the prosecution invoked

it in closing argument (T.1574-75). Second, any marginal probative value that the tape might have possessed so substantially outweighed by its prejudicial effect that its exhibition to the jury denied petitioner his rights under the Eighth Amendment.

No foundation was, or could have been, laid to permit the jury to find that the particular emotion-inducing details on which the prosecution focused -- the "gnarled hands" and the child's "stare" -- were relevant to show the "heinousness" or "depravity" of petitioner's conduct. The heinousness of the conduct that produced these tragic results was hardly in dispute in any event. For all that appears in the record, the shocking stares that appear in the eyes of the two murder victims may be common to virtually all deaths. Be that as it may, the victims' appearance one hour after death, when rigor mortis had already set in, tells the jury nothing about the heinousness of that conduct.

Assuming arguendo that the display of those aspects of the scene not distorted by the passage of time following death were relevant to show the heinousness of the conduct, the tape's prejudicial effect nonetheless substantially outweighed its marginal probative value. There was no need to provide the jury with a two minute exhibition of the effects of rigor mortis in order to make them aware of the nature of the offense. The jury had, after all, seen black and white photographs of the scene and of the victims and had heard several witnesses give graphic, detailed descriptions of the number, location and effect of the stab wounds.

That the tape's prejudicial effect outweighed whatever marginal relevance it may have possessed was apparently understood by the trial judge, who stated that, though the tape may not have been admissible during the guilt phase, it was admissible during the sentencing phase of the trial (T.1493). Taking virtually an "anything goes" approach in the sentencing phase, the trial judge seemingly considered himself to be under a statutory command to admit any evidence having any probative value, without regard to whatever prejudicial effect the evidence might possess (T.1493).¹⁰

Lest the Court believe that petitioner seeks to constitutionalize F.R.Evid. 403 in every death penalty sentencing trial, we quickly note that petitioner only seeks redress of the denial of his right to have the jury make a reasoned, moral judgment about whether he lives or dies. There can be no doubt, we respectfully submit, about the inadmissibility of the tape. The sole issue will be whether its introduction had the capacity to divert the jury's attention to the extent that there was a reasonable likelihood that the jury did not make the reasoned, moral judgment that the Eighth Amendment requires.

¹⁰The Tennessee statute by which the trial judge felt commanded to permit the introduction of any relevant evidence was Tenn. Code Ann. § 39-2-203(c), which is quoted supra, note 6.

B. The Erroneous Introduction of the Video Tape Deprived Petitioner of His Rights Under the Eighth and Fourteenth Amendments.

Establishing the inadmissibility of the tape -- either because of its complete lack of relevance or because any marginal relevance it might possess would be outweighed by its prejudicial effect -- does not, of course, end the argument. Petitioner must, and can, also show that the introduction of this inadmissible evidence violated the Eighth Amendment's prohibition of cruel and unusual punishment. It is, we acknowledge, one thing to determine that the state courts have made an erroneous evidentiary ruling. It is quite another to conclude that the erroneous ruling contravened a specific provision of the Constitution.

The sentencer in a death penalty case must be allowed to perceive and treat the defendant "as a uniquely human being" and to make a "reliable determination that death is the appropriate sentence." Penry v. Lynaugh, 492 U.S._____, 109 S.Ct. 2934, 2947 (1989). As Justice O'Connor wrote in Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869 (1982) (concurring opinion):

Because sentences of death are "qualitatively different" from prison sentences, Woodson v. North Carolina, . . . this Court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that would guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake (emphasis added).

Important to our analysis is an explanation of why a death sentence imposed out of passion conflicts with the specific terms of the Eighth Amendment. Merely showing that there are sound policy reasons why a death penalty should not be imposed out of passion avails petitioner nothing. We must, and can, demonstrate that prohibiting death sentences imposed out of passion serves one of the basic principles that the framers of the Bill of Rights sought constitutionally to preserve through the Eighth Amendment.

Two aspects of the framers' adoption of the Eighth Amendment must be considered in making this analysis. First, the framers sought to prohibit capital punishment when it is disproportionate to the particular offense for which the government seeks it. Second, the framers undoubtedly recognized that in most cases the trier of fact would have broad discretion to make the determination of whether a death sentence is called for by the facts of the case.

If we accept the proposition that the framers intended that the death penalty be imposed only when proportionate to the offense under consideration and if we further acknowledge their expectation that the sentencing decision would in most instances rest with the trier of fact, we can easily understand the limited, though vital, role that the courts must play if the Eighth Amendment's fundamental purposes are to be vindicated. Because the fact trier plays such an important role in implementing the Eighth Amendment's protection against disproportionate punishment, the fact trier's broad discretion must be guided, with minimum judicial interference, to ensure that the fact finder considers the evidence

properly bearing on the propriety of the sentence. Without such limited guidance, there is a constitutionally impermissible risk that the jury's decision will be based on factors not bearing on whether capital punishment is warranted by the facts under scrutiny. Delegating to the courts the limited role of ensuring that the fact trier's discretion is properly focused is, therefore, essential to the implementation of the Eighth Amendment's protection against disproportionate punishment.

Recognizing that the fact trier must receive sufficient guidance to make a reasoned, moral judgment on whether a defendant lives or dies, this Court has, for example, held that the Eighth Amendment requires that a defendant be given the opportunity to present mitigating evidence. Eddings v. Oklahoma, *supra*; Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2754 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976).

This Court has also concluded that, just as proper guidance of the jury's discretion requires ensuring that the jury consider all relevant evidence, it also requires, in some instances, that certain matters be withdrawn from the jury's consideration. For example, the Court has held that a jury's discretion was improperly guided when a prosecutor implied that the jury would not have the final say on whether a defendant lived or died. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). The Court reversed the defendant's sentence in that case, because there was a constitutionally impermissible risk that the jury had imposed the death sentence for unwarranted reasons. Id.

More germane to the instant case, the Court has held that the introduction of prejudicial, inflammatory victim impact evidence prevented the jury from making the reasoned decision that the Eighth Amendment requires. Booth v. Maryland, *supra*; South Carolina v. Gathers, *supra*. While petitioner recognizes there is disagreement among the members of this Court over a state's authority to make victim impact evidence relevant, there is, we believe, no dispute about the fundamental proposition that the introduction of inadmissible, inflammatory evidence can so substantially divert the jury's attention that it is prevented from making the reasoned, moral judgment that the Eighth Amendment requires.

A death sentence that is "imposed out of whim, passion, prejudice or mistake," Eddings, 455 U.S. at 118, contravenes the fundamental principle that the imposition of capital punishment must not be disproportionate to the particular offense under consideration. Such a sentence, because of the likelihood that it is based on improper factors, carries with it the unacceptable risk that death is being imposed when it should not be -- i.e., in situations in which the death sentence is disproportionate to the nature and surrounding circumstances of the offense.

If the principle that a death sentence may not be imposed out of passion is to mean anything, the sentence imposed in this case must be reversed. The Eighth Amendment requires that a defendant facing capital punishment be given a meaningful opportunity to plead for his life to a jury capable of objectively considering the

evidence and arguments offered by both parties. Here, there was, to put it mildly, a reasonable likelihood that the showing of the video tape influenced the jury to the point that it could not make the requisite objective evaluation. More realistically, it is inconceivable that a viewer of the video tape could take the two minute "walk" through the Christophers' apartment and still give meaningful consideration to any evidence offered by petitioner, much less the mitigating evidence which, by virtue of the order of the proof, petitioner was forced to offer immediately upon the heels of the display of the tape.

That a state may impose the death penalty for crimes of the type involved in this case is settled. It is conceivable, we acknowledge, that a properly guided jury, exercising the broad discretion afforded it under the Eighth Amendment, might perhaps conclude that petitioner should be executed, notwithstanding his youth, good work habits, previous accomplishments, and lack of previous criminal record. In this case, though, petitioner never was given the opportunity to plead for his life to a jury capable of objectively considering these mitigating factors and making the reasoned moral judgment required by the Eighth Amendment.

II. The introduction of victim impact evidence, when combined with the statements and conduct of the Assistant District Attorney General for the State of Tennessee, denied Petitioner's rights under the Eighth and Fourteenth Amendments.

While we are confident that the inadmissibility of the tape is a proposition all the members of this Court will readily accept, we, of course, make no such statement concerning the victim impact evidence. We are mindful that some of the members of this Court are of the view that exclusion of such evidence is not constitutionally required. Because the holdings of Booth and Gathers clearly condemn the introduction of victim impact evidence introduced by the prosecution in this case, petitioner's sentence must be reversed if those decisions are allowed to stand.

In its previous decisions in Booth and Gathers, this Court, though closely divided, has flatly held that evidence of the impact of a crime on its victims is irrelevant and therefore inadmissible in a proceeding in which the jury is asked to determine whether to impose the death sentence on a defendant. Gathers, supra, 490 U.S. at ___, 109 S.Ct. at 2211; Booth, supra, 484 U.S. at ___, 107 S.Ct. at 2533. Under the Court's holding in Griffith v. Kentucky, supra, those decisions should be applied retroactively. At the sentencing phase of petitioner's trial, his rights to an individualized, rational decision on the basis of his offense and his personal qualities was denied both through the introduction of the testimony of Charisse Christopher's mother and the arguments of the state's attorneys. In addition, the prosecution was not only permitted to introduce victim impact evidence and argue extensively

to the jury about the impact of the stabbings on Christopher, it was also permitted through the video and argument of counsel, to portray the impact in a fashion that was misleading and prejudicial.

A. The Tennessee Supreme Court Erroneously Held, Under the Circumstances of This Case, That the Victim Impact Evidence Introduced Through Nicholas Christopher's Grandmother Was Harmless Error.

The Tennessee Supreme Court acknowledged that the statements introduced through Mrs. Zvolanek, Nicholas Christopher's grandmother, were technically irrelevant and of the type that this Court condemned in Booth v. Maryland, supra. The court held, however, that this evidence was harmless error and did not create a "constitutionally unacceptable risk of an arbitrary imposition of the death penalty." 719 S.W.2d at 18. The court sought to distinguish Booth on the basis that the irrelevant information in Booth was more extensive and inflammatory than that introduced through Mrs. Zvolanek at petitioner's trial.

Booth and the subsequent case of Gathers v. South Carolina, supra, both stand for the proposition that the sentencing jury is supposed to focus on the moral culpability of the defendant and that victim impact statements improperly divert the jury's attention away from the defendant. While the victim impact statements introduced through Nicholas Christopher's grandmother were not of the "quantity" as those allowed by the lower courts in

Booth and Gathers, those statements, with the reemphasis by State's closing argument, were every bit as inflammatory.

A distinction based upon quantity in this context is unrealistic. Beyond a certain point, this type of evidence becomes cumulative and subsequent increments are irrelevant. The critical point is the initial shock when the jury is invited to respond emotionally to the tragedy effected by the death of the particular individual who is the victim in the case before it.

During the sentencing phase, the jury heard testimony that Nicholas cries for his mother and sister and asks his grandmother several times a week if she misses her. In her closing argument, the Assistant District Attorney General referred extensively to this evidence. She emphasized the sorrow and longing of Nicholas Christopher and, in effect, pleaded with the jury to sentence petitioner to death for Nicholas' sake.

In reaching its conclusion that Booth could be distinguished, therefore, the Tennessee Supreme Court concluded that the victim impact evidence was less harmful because it was not of the same quantity as that introduced in Booth. In so doing, the court failed to take into account the prejudicial effect of Mrs. Zvolanek's testimony. Moreover, and perhaps more significantly, the court mistakenly formulated a distinction based upon quantity only because it refused to place the prosecution's argument in the "victim impact" category.

B. The Tennessee Supreme Court Erroneously Held That the Victim Impact Statements Made by the State, During Closing Argument in the Sentencing Phase of Petitioner's Trial, Did Not Violate Either Booth or Gathers.

The Tennessee Supreme Court held that the victim impact statements made by the prosecution during closing argument in the sentencing phase of petitioner's trial were relevant to petitioner's personal responsibility and moral guilt. The court stated that:

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deed of defendant (as was in this case). Without limitation as to relevancy, but nothing may be said that bears upon the victims.

791 S.W.2d at 19. The court then concluded that the victim impact statements made by the State did not violate Booth or Gathers. 791 S.W.2d at 19.

Fairly read, the Tennessee Supreme Court's opinion, based apparently upon a misreading of Booth and Gathers, in this case squarely holds that victim impact statements are permissible in the sentencing phase of a death case. In so doing, the court rejected, sub silentio, this Court's holdings in Booth and Gathers.

In Gathers v. South Carolina, supra, the prosecutor read at length from a religious tract, "A Game Guy's Prayer", that the victim had been carrying at the time of his murder. The prosecution commented on the victim's personal qualities, which the prosecutor inferred from the religious tract and the victim's voter registration card. Relying upon Booth, this Court noted that

evidence of the victim's religious beliefs and prosecutor's statements regarding the victim's character were inadmissible for the purpose of determining the defendant's sentence in that they were irrelevant to his decision to kill. Gathers, supra, 109 S.Ct. at 2207.

In the instant case, the prosecution's closing argument encompassed almost every conceivable type of victim impact information. While the central theme of the State's argument was built on the effect the murders had, and would have, upon Nicholas Christopher, their argument also focused attention upon Charisse Christopher's "mother and daddy who loved her" and Lacie Christopher's "grandparents who are still here" and the effect the deaths would have upon them (T.1594-1595). In addition, the prosecution commented, without proof, that Charisse Christopher had lived an exemplary life. Under the law as it now stands, such statements are not permissible during the sentencing phase in a death case for the reasons stated in Booth and Gathers.

This case highlights still another reason, previously addressed in this Court's opinion in Gathers, for rejecting victim impact evidence in death cases. The prosecution took great liberties with the record in this case in a number of respects. As indicated in the statement of the case, the prosecution made extensive argument that was based upon the appearance of the victims over an hour after the crime without ever offering any evidence to show that the particular features to which he referred were a manifestation of the petitioner's acts. In addition, as

just noted, the prosecution also argued to the jury that Charisse Christopher had lived an exemplary life without any evidence in the record upon which to base such statements. Such evidence would not, of course, have been admissible under this Court's holdings in Booth and Gathers. If there were no prohibition of victim impact evidence, the prosecutors would undoubtedly be tempted to develop whatever evidence they could of the victim's good character, without regard to its trustworthiness. The defense attorney would then be left with the hopeless dilemma of either letting such evidence stand unchallenged or presenting an all out character attack upon a person who has just been shown to have been the victim of a homicide. No matter how truthful and well presented such an attack might be, it is hard to imagine a case in which the attack would not do the defendant more harm than good.

C. The Harmless Error Standard of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), Even if Applicable to a Capital Sentencing Case, Was Improperly Applied By the Tennessee Supreme Court.

In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), this Court held that certain violations of a person's constitutional rights at trial may nevertheless not render the conviction subject to reversal when the error is found to be "harmless beyond a reasonable doubt." Although the Court has recognized that some violations of constitutional rights may be so fundamental that they can never be harmless, see, e.g., Gray v.

Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987) (violation of Witherspoon may not be harmless error), a majority of the Court in Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792 (1988), applied the Chapman standard in holding that the use, at a sentencing proceeding, of evidence obtained in violation of a defendant's constitutional rights was not harmless error beyond a reasonable doubt. In a separate concurring opinion, in which Justice Brennan and Justice Blackmun joined, Justice Marshall agreed that the judgment affirming a death sentence should be reversed. He insisted, however, that the majority had erred in applying the harmless-error analysis to the particular constitutional violation at issue. We submit that the reasoning of Justice Marshall's concurring opinion applies with even greater force to petitioner's case, in which constitutional error relates even more directly to the integrity of the verdict.

In Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), this Court held that a defendant formally charged with a capital crime had a constitutional right to consult with an attorney before submitting to a psychiatric examination conducted to determine the defendant's future dangerousness.

In Satterwhite, supra, the Court concluded, as had the Texas Court of Criminal Appeals, that the use of psychiatric testimony at the defendant's sentencing hearing had violated the defendant's rights under Estelle v. Smith, supra, 486 U.S. at ___, 108 S.Ct. at 1797. Applying the Chapman harmless-error test, the Court disagreed with the Texas Court of Criminal appeals and concluded

that the use of testimony obtained in violation of Estelle v. Smith was not harmless beyond a reasonable doubt.

Even if the Tennessee Supreme Court were correct in its conclusion that the harmless-error rule should be applied to a violation of Booth and Gathers, however, it erred in its conclusion that those errors were harmless beyond a reasonable doubt. As noted above, the evidence introduced in violation of petitioner's rights by the prosecution in this case was of a highly emotional, inflammatory nature. As the Court warned in Satterwhite:

It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.

486 U.S. at ___, 108 S.Ct. at 1798. Although the Court then concluded that "a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury" id., it cited the critical nature of the issue on which the testimony was offered and reversed the sentence. In petitioner's case, the issue, whether the mitigating circumstances outweighed the aggravating circumstances, was also critical. In order to avoid a sentence of death, petitioner had the burden of proving that the mitigating evidence outweighed the aggravating circumstances charged by the prosecution. The improperly admitted evidence, however, was not just the testimony of a single witness. It was the testimony of

the mother/grandmother of the victims, and the misleading, inflammatory video tape, and the improper, factually unsupported, Gathers-violative closing argument of the Assistant District Attorney General. Should the Court apply the harmless-beyond-a-reasonable doubt standard to the violation of petitioner's rights shown here, the quantity and quality of the evidence and argument presented by the State at petitioner's sentencing trial could not be considered harmless violations of petitioner's rights under this Court's reasoning in Satterwhite.

III. The jury instruction imposing upon petitioner the burden of proving that the mitigating evidence outweighed the aggravating circumstances deprived petitioner of his right to have the jury make the individualized determination required by the Eighth and Fourteenth Amendments.

We have already seen that the fact trier's discretion must be properly guided in order to vindicate the Eighth Amendment's prohibition against disproportionate sentences (see discussion of Issue I, supra at pp. 20-21). The issue that we now raise asks a different question: What limits may a state constitutionally place on the fact trier's discretion?

It would appear that the parameters within which a state may limit the fact trier's discretion have already been set by decisions of this Court. A state may not, on the one hand, make the imposition of a death sentence mandatory for certain offenses. Woodson, supra. The Constitution does not, however, require that the fact trier have unfettered discretion to decline to impose the death penalty. Boyde v. California, 494 U.S._____, 110 S.Ct. 1190 (1990); Blystone v. Pennsylvania, 494 U.S._____, 110 S.Ct. 1078, 1081 (1990).

Nor is it unconstitutional for a State to place upon the defendant the burden of showing by a preponderance of the evidence that the mitigating circumstances are sufficiently substantial to call for leniency. Walton v. Arizona, ____ U.S._____, 110 S.Ct. 3047, 3055-56 (1990). Such an instruction still affords the defendant the benefit of the individualized assessment that the

Eighth Amendment requires since the jury's focus is properly on the question of whether "death is the appropriate penalty under all the circumstances." Boyde, supra, 494 U.S. at _____, 110 S.Ct. at 1195. With the exception of Justice Scalia (concurring opinion, 110 S.Ct. at 3058), the Court in Walton did not abandon its commitment to the principle that the Eighth Amendment requires an individualized sentencing determination in a capital case.

In Boyde, the challenged jury instruction, unlike the one in the instant case, did not make the success of the defendant's plea for his life dependent upon convincing the jury that the mitigating evidence outweighed the aggravating circumstances. After reminding the jury "to consider all applicable aggravating and mitigating circumstances," 494 U.S. at _____, 110 S.Ct. at 1194, the trial court had instructed the jury:

If you conclude that the aggravating circumstances outweighed the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweighed the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole (emphasis supplied by opinion).

494 U.S. at _____, 110 S.Ct. at 1195.

Rejecting Boyde's claim that this instruction deprived him of the requisite individualized assessment, this Court specifically pointed out that the California courts had construed the instruction to mean that it "could not permissibly require a juror to vote for the death penalty 'unless, upon completion of the 'weighing' process, he decides that death is the appropriate

penalty under all the circumstances"" (emphasis added) *Id.* What saved the instruction in Boyd from being held unconstitutional under Woodson and its progeny, therefore, is the fact that it allowed the jury to properly perform its intended role under the Eighth Amendment -- namely, the weighing of the evidence to determine whether, under all the circumstances, death is the appropriate penalty. *Id.*

The Tennessee statute in effect at the time of petitioner's trial¹¹ commanded, and the jury was instructed (T.1598-99), that if the jury unanimously determined "that at least one statutory aggravating circumstance or several statutory aggravating circumstances ha[d] been proved by the state, beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstances, the sentence shall be death." (emphasis added). A juror who thus believed that any of the aggravating circumstances existing here¹² "outweighed" the mitigating evidence offered by petitioner was required to vote to impose the death penalty, even

¹¹Tenn. Code Ann. § 39-2-203(g) provided:

If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstances, the sentence shall be death (Appendix B).

**

¹²The prosecution argued that three of the statutory aggravating circumstances were present: (1) The murder was committed against a person less than twelve years of age and the defendant was eighteen years or older; (2) defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder; and (3) the murder was especially heinous, atrocious, or cruel, in that it involved torture or depravity of mind (T.1573).

though he might have felt that, under all the facts and circumstances of the case, defendant's life should be spared. Smith v. North Carolina, 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982) (separate opinion of Stevens, S.) denying cert. to 305 N.C. 691, 292 S.E.2d 264 (1982). This limitation on the jury's discretion thus prevented the jury from playing the vital role the framers intended it to have in implementing the Eighth Amendment's prohibition against disproportionate sentences.

A weighing process that requires a defendant to prove that mitigating circumstances offset, or somehow are more important than, a statutorily identified aggravating circumstance deprives a defendant of the meaningful individualized assessment that the Eighth Amendment requires. Petitioner's jury was, in essence, asked to decide: Which is of greater significance -- the brutal stabbing of a mother and her two young children or the evidence concerning petitioner's youth, good work habits, lack of a previous criminal record and borderline retardation? A juror would be hard pressed, to say the least, to answer that question in petitioner's favor; yet, a juror could quite conceivably have determined that this one incident, horrible and tragic as it is, did not warrant taking petitioner's life. Irrespective of who bears the burden on the issue, the Eighth Amendment requires that the jury decide whether the mitigating circumstances call for leniency, not whether one category of evidence is superior to or "outweighs" another. Only then can one be certain that the jury is really deciding whether death is the appropriate penalty under all the

circumstances. The instruction given petitioner's jury created a constitutionally impermissible risk that some jurors voted for imposition of the death penalty even though they may have felt that all the circumstances warranted a sentence of life imprisonment.

Like the juries in Boyde and Walton, petitioner's jury should have been permitted to decide whether death was the appropriate penalty under all the circumstances. Boyde, 494 U.S. at _____, 110 S.Ct. at 1195. Because his jury was not permitted to exercise the discretion that the fact trier must have if the Eighth Amendment's prohibition against disproportionate punishment is to be given effect, petitioner's sentence must be reversed.

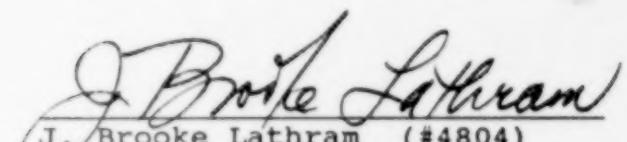
This Court's decision in Blystone v. Pennsylvania, supra, does not require a different result. When a defendant offers no mitigating evidence at all, the jury has no role to play in implementing the Eighth Amendment's protection against disproportionate punishment. When, however, a defendant does offer mitigating evidence, the jury, if the Eighth Amendment's purpose is to be carried out, must be given discretion to decide whether, under all the facts and circumstances pertaining to the defendant's particular case, death is the appropriate punishment.

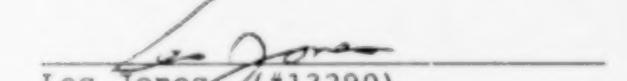
For the foregoing reasons, petitioner's sentence must be reversed.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,


J. Brooke Lathram (#4804)
Burch, Porter & Johnson
130 North Court Avenue
Memphis, Tennessee 38103
(901) 523-2311


Les Jones (#13290)
Burch, Porter & Johnson
130 North Court Avenue
Memphis, Tennessee 38103
(901) 523-2311

September 12, 1990 -

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing has been mailed, postage prepaid, to Charles W. Burson, Attorney General and Reporter, 450 James Robertson Parkway, Nashville, Tennessee 37219-5025; and one copy to Norma Crippen Ballard, Esq., 450 James Robertson Parkway, Nashville, Tennessee 37219-5025, this 12th day of September, 1990.

J. Brooke Latham

A P P E N D I X

ORIGINAL

(3)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

Supreme Court, U.S.
FILED
OCT 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-5721

PERVIS TYRONE PAYNE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

RECEIVED

OCT 15 1990

OFFICE OF THE CLERK,
SUPREME COURT, U.S.

ON PETITION FOR THE WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES W. BURSON
Attorney General & Reporter

GORDON W. SMITH
Assistant Attorney General
Counsel of Record

450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-6439

Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. 90-5721

PERVIS TYRONE PAYNE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of Tennessee, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion of the Supreme Court of Tennessee in this case.

OPINION BELOW

The opinion of the Supreme Court of Tennessee is reported at 791 S.W.2d 10.

JURISDICTION

The opinion of the Supreme Court of Tennessee was filed on April 16, 1990. Justice Scalia signed an order on June 29, 1990, extending the time for filing a petition for a writ of certiorari until September 13, 1990. The petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the introduction of a video tape of a homicide scene made more than one hour after the offense violated petitioner's rights under the Eighth and Fourteenth Amendments by preventing the jury from making a reasoned, moral decision on whether to impose the death penalty;

2. Whether the introduction of victim impact evidence, when combined with the statements and conduct of the Assistant District Attorney General for the State of Tennessee, denied petitioner's rights under the Eighth and Fourteenth Amendments;

3. Whether a jury instruction imposing upon petitioner the burden of proving that the mitigating evidence outweighed the aggravating circumstances deprived petitioner of his right to have the jury make the individualized determination required by the Eighth and Fourteenth Amendments.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Question one does not merit the granting of review.

The petitioner contends that the introduction at the sentencing hearing of a videotape of the crime scene was (1) erroneous under state law and (2) deprived the petitioner of his rights under the Eighth and Fourteenth Amendment.

STATEMENT OF THE CASE

On February 16, 1988, a Shelby County, Tennessee, Criminal Court jury found the petitioner guilty of first-degree murder, Tenn. Code Ann. §39-2-202, in the deaths of Charisse Christopher and her daughter, Lacie, and guilty of assault with intent to commit first-degree murder, Tenn. Code Ann. §39-2-103, of her son, Nicholas. The jury sentenced the petitioner to death for each of the murders. The trial court sentenced the petitioner to thirty (30) years in the Department of Correction for the assault.

The Supreme Court of Tennessee affirmed the convictions and sentences on April 16, 1990. State v. Payne, 791 S.W.2d 10 (Tenn. 1990). The execution of the petitioner's death sentences has been stayed by the Supreme Court of Tennessee pending review of the instant petition.

Whether the evidence was admissible at the sentencing hearing is a matter of state evidentiary law and does not present a federal question. Essentially, the petitioner is asking the Court to supervise state evidentiary law. However, this Court has no supervisory jurisdiction over state courts and, in reviewing a state court judgment, is confined to evaluating it in relation to the federal constitution. Chandler v. Florida, 449 U.S. 560, 570 (1981).

In any event, the introduction of the videotape did not violate the Eighth Amendment. As the Tennessee Supreme Court noted, the videotape was relevant to an aggravating circumstance asserted by the State, i.e., that the murder "was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind", Tenn. Code Ann. §39-2-203(i)(5). State v. Payne, 791 S.W.2d at 19-20. Although the videotape is certainly unpleasant, it is not

gruesome or so graphic as to suggest a decision by the jury on an improper basis resulting in a death sentence "imposed out of whim, passion, prejudice or mistake." See generally Eddings v. Oklahoma, 455 U.S. 104, 118 (1982). The Supreme Court of Tennessee properly conducted a weighing of the probative value of the evidence versus the danger of unfair prejudice. Review of the question presented should be denied.

2. The cases relied upon by the petitioner in question two are distinguishable on their facts; in any event, if error was committed, it was harmless beyond a reasonable doubt and furnishes no basis for this Court's review.

The petitioner contends that the testimony of Nicholas Christopher's grandmother regarding his reaction to the loss of his mother and sister, and the prosecutor's jury argument about the physical and mental harm to Nicholas by the petitioner, constituted inadmissible victim impact statements prohibited under this Court's decisions in Booth v. Maryland, 483 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. ___, 109 S.Ct. 2207 (1989).

In both Booth and Gathers, this Court found that the inherent problem with victim impact statements is their tendency to introduce factors wholly unrelated to the blameworthiness of the particular defendant. The Court has repeatedly emphasized that in imposing the death penalty, the

"punishment must be tailored to [the defendant's] personal responsibility and moral guilt." Booth, supra, 483 U.S. at ___, 107 S.Ct. at 2533, citing Enmund v. Florida, 458 U.S. 782 (1982). However, where it can be shown that the information relates directly to the circumstances of the crime or the defendant's moral culpability, the information is relevant and admissible. Gathers, supra, 490 U.S. at ___, 109 S.Ct. at 2211.

In this case, the testimony and argument regarding Nicholas' emotional trauma related not only to the circumstances of the crime but to the moral culpability of the defendant as well. The circumstances of this crime involved the brutal slayings of Nicholas' mother and only sibling to which he was an eyewitness and victim. The testimony and argument was also relevant to one of the statutory aggravating factors, that is, whether the murders were heinous, atrocious, or cruel in that they involved torture or depravity of mind. Part of what makes the crime in this case so heinous and cruel (to inflict suffering) is that it involved the murder of Nicholas' mother and infant sister. In this case, it cannot be said that the testimony and argument were wholly unrelated to the circumstances of the crime or the defendant's moral culpability. Unlike the situations in Booth and Gathers, here the defendant's level of culpability was dependent upon circumstances over which he

had control, not upon fortuitous circumstances such as the composition of the victim's family or the victim's possession of religious items. In this case, the fact that Nicholas expresses grief over the loss of his family members is clearly attributable to the act of will of the petitioner.

Additionally, unlike the factual situations in Booth and Gathers, the testimony and argument in this case were not voluminous or detailed and constituted only a portion of the State's case. The assailed matters are insignificant in comparison with the large package of traits involved in Booth that added up to a Victim Impact Statement. Moreover, the jury was not instructed that it was to consider such proof in determining the appropriate punishment for the petitioner.

Finally, to the extent that the matters complained of might be deemed irrelevant and inadmissible, the error was harmless beyond a reasonable doubt. Given the minimal scope of the testimony and argument and the overwhelming evidence justifying the death penalty, it is beyond a reasonable doubt that the error complained of did not contribute to the jury's verdict. See Satterwhite v. Texas, 486 U.S. 249 (1988). The question presented does not warrant the granting of certiorari.

3. This Court's prior decisions demonstrate that review of question three is unwarranted.

The petitioner contends that a jury instruction imposing upon a defendant the burden of proving that the mitigating circumstances outweighed the aggravating circumstances violated the Eighth Amendment.

First, the jury instruction in this case, consistent with the Tennessee Supreme Court's construction of Tennessee's death penalty statute, placed no such burden upon the petitioner. See State v. Thompson, 768 S.W.2d 239, 251, 252 (Tenn. 1989).

Second, this Court rejected a similar contention in Blystone v. Pennsylvania, ____ U.S. ___, 110 S.Ct. 1078 (1990), and Boyd v. California, ____ U.S. ___, 110 S.Ct. 1190 (1990). In Blystone, this Court, quoting from its opinion in McCleskey v. Kemp, 481 U.S. 279 (1987), summarized the constitutional requirements for death penalty statutes as follows:

In sum, our decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the state must establish rational criteria that narrowed the decision maker's judgment

as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents the state from imposing the death penalty for that offense. Second, consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the state cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES W. BURSON
Attorney General & Reporter

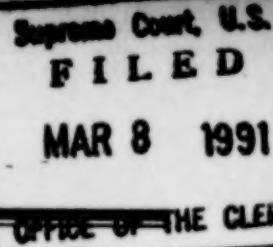
Blystone, ____ U.S. ____, 110 S.Ct. at 1084. Like the Pennsylvania statute, Tennessee's statute and jury instructions meet those requirements by requiring the finding, beyond a reasonable doubt, of an aggravating circumstance or circumstances as a threshold to the imposition of the death penalty, and by permitting the jurors to consider any mitigating circumstance or circumstances. There is no constitutional impediment to requiring the imposition of a sentence of death in accordance with the jury instructions in this case. The granting of certiorari on this issue is unwarranted.

GORDON W. SMITH
Assistant Attorney General
Counsel of Record

450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-6439

Counsel for Respondent

No. 90-5721



IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PERVIS TYRONE PAYNE,
Petitioner,
v.

TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

JOINT APPENDIX

J. BROOKE LATHRAM
130 North Court Avenue
Memphis, Tennessee 38103
(901) 523-2811

Counsel for Petitioner

CHARLES W. BURSON
Attorney General & Reporter
450 James Robertson Parkway
Nashville, TN 37243-0485
(615) 741-6474

Counsel for Respondent

PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1990
CERTIORARI GRANTED FEBRUARY 15, 1991

52P

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Trial Transcript:	
Witness Mary Zvolanek	2
Prosecution's Opening Statement (Sentencing Phase)	4
Prosecution's Closing Argument (Sentencing Phase)	6
Prosecution's Rebuttal Argument (Sentencing Phase)	13
Jury Instructions	18
Verdict Form	23
Opinion of the Supreme Court of Tennessee, April 16, 1990	25
Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, as amended, February 19, 1991	48

RELEVANT DOCKET ENTRIES

Date	Proceedings
September 1, 1987	Payne Indicted For the Murders of Charrisse A. Christopher and Lacie Jo Christopher and For Making an Assault With a Knife Upon Nicholas A. Christopher With the Intent to Murder
February 9, 1988- February 16, 1988	Trial
April 16, 1990	Tennessee Supreme Court Affirmed Payne's Conviction and Sentence

IN THE CRIMINAL COURT OF TENNESSEE
 AT MEMPHIS
 30TH JUDICIAL DISTRICT

Cause No. 87-04408
 87-04409
 87-04410

TENNESSEE

v.

PERVIS TYRONE PAYNE

* * * *

[1504] MARY ZVOLANEK,

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. GARDNER:

- Q. Would you tell us your name, please, ma'am?
- A. Mary Zvolanek.
- Q. Would you spell your last name for the court reporter?
- A. Z-v-o-l-a-n-e-k.
- Q. Ms. Zvolanek, how many children have you had?
- A. Eight.
- Q. And are you the mother of Charisse Christopher?
- A. Yes, I was.
- Q. Are you also the grandmother of Lacie Jo and Nicholas Christopher?
- A. Yes.

Q. Ms. Zvolanek, how has the murder of Nicholas's mother and his sister affected him?

A. He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell [1505] him yes. He says, I'm worried about my Lacie.

MS. GARDNER: Thank you.

No further questions.

THE COURT: Do you have any questions?

MR. GARTS: No questions, Your Honor.

THE COURT: You may step down.

* * * *

PROSECUTION'S OPENING STATEMENT

SENTENCING STAGE

MR. HENDERSON: Ladies and gentlemen, this is the stage of the trial that I asked you a lot of questions about during voir dire, and I'm sure you all have even more questions than I asked about what happens now. At this stage of the trial both sides are allowed to introduce any further evidence concerning what are called aggravating and mitigating factors. The aggravating factors are listed in the statute. The Judge will tell you, I believe, about four or five particular aggravating circumstances that are raised by the facts in this case or the evidence in this case.

The State expects to prove or has—expect we have proven several of them already. You will, of course, consider all of the evidence that you heard in the first part of the trial during the second part of the trial. We expect this part of the trial to be much briefer than the first part of the trial, of course, since most of the evidence on sentencing has already been introduced on both sides, although you will hear some additional proof.

The aggravating factors the State expects to ask you to find at the end of the penalty phase and we expect to have already proven and show you some additional proof is one at least as to Lacie Jo one of the aggravating factors set out by our Legislature as a grounds for ordering the death penalty is that the victim was under the age of twelve years old. And officer as to Lacie, she was only two years old. So we expect that aggravating circumstance has been proven beyond a reasonable doubt and to a moral certainty, and it's really not contested.

Another aggravating factor that we expect the proof to have shown and to continue to show during this stage of the trial is that the defendant caused the risk of death to two or more persons other than the person murdered. And of course, in this case there were three people there. At the time that he murdered Charisse he not only caused

a risk of death or serious bodily harm—or death to others but did cause death to one other and was serious risk of death to one other one as well as the one other one he killed. So that one we expect to be proven, and basically has been proven and there's not much contradiction of that.

The third one we expect to show you some more proof on and we expect already has been proven is that the murder was heinous, atrocious, and cruel. In this case we expect to show you a little more proof as to exactly how heinous, atrocious, and cruel this killing was. And we submit that at the end of this case, end of this phase of the trial, you will find that factor too has been found beyond a reasonable doubt and to a moral certainty.

At the next stage of the trial we plan on offering probably just two witnesses, one of them is Mary Zvolanek. She will tell you something about the heinous, atrocious, and cruel nature of what happened and its effect on Nicholas. And then we're going to show you about two minutes, roughly, of a color videotape of the crime scene which will show you in much more detail and much more accurately the nature of the attack on the two victims of the murder in the first degree indictments. We submit that proof will show you beyond any doubt that this was a heinous, atrocious, and cruel murder.

Thank you.

* * * *

**PROSECUTION'S CLOSING ARGUMENT
SENTENCING PHASE**

[1571] THE COURT: Okay. I think now we're ready for the next stage of this hearing which would be the closing statements of the attorneys.

MR. HENDERSON: Ladies and gentlemen, we're at the stage of the trial that I talked to you about back—[1572] seems like a couple of weeks ago, but it's only a week ago from tomorrow when we started. This is the phase where you all will determine punishment. When I get through speaking Mr. Garts will get up and make his plea, and then Ms. Gardner will get up to rebut some of the things he says, and the Judge again will give you the instructions on the law. And you all again will go back to deliberate and reach your unanimous verdict. You will return that verdict here in open Court, and the case of *State of Tennessee v. Pervis Tyrone Payne* will be over. After about a week.

What you will hear in this part of the trial will be somewhat different as far as the law goes than what you heard in the first part of the trial. It will be much shorter since there is only one real issue, and that's the difference between life and death. The procedure, although it sounds a little complicated, is not really all that cumbersome. I believe the Judge will tell you that in order to sentence someone to death by electrocution in this state, you must find one or more of what are called aggravating circumstances.

In this case, I submit to you, you're going to find that the aggravating circumstances are relatively easy to follow, at least three of them are. One of them being, of course, that the murder was committed against a [1573] person less than twelve years of age and the defendant was eighteen years of age or older. That's virtually uncontradicted and uncontroverted in this case. There is absolutely no question about it, that Lacie Jo was under

twelve, she was two. There's absolutely no question that the defendant is over eighteen. He's twenty. That one has been established beyond any shadow of a doubt, even though that is not the burden of proof.

The other one is that the defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder. At the time he murdered Charisse Christopher did he cause a risk of death to two or more other than Charisse? In this case, again, there can be no doubt, there were two other people in there stabbed, one to death and the other one virtually to death. Aggravating circumstance No. 2 has been established.

And the third, the murder was especially heinous, atrocious, or cruel, in that it involved torture or depravity of mind. That one at least has somewhat more subjective words in it, not as concrete as figuring out how old someone is or counting up the number of bodies littering a kitchen floor. But whether or not it was especially heinous, atrocious or cruel, and that it involved torture or depravity of mind. In order to [1574] determine whether or not that aggravating circumstance exists, you have to again think about the evidence that you all have considered so far about—not in this case so much who did it but how did it happen, as far as we can reconstruct from the evidence in the case. How did it happen. Not why or who at this stage, but how did it happen. Is it heinous, atrocious, or cruel and did it involve depravity of mind?

You all have seen the picture in Exhibit No. 22 which gave you some indication of how violent the attack was, how heinous the attack was, how atrocious, and a lot of these mean basically the same. But I think you will agree that they don't have the impact of that two minutes of videotape that you saw. Now, the two minutes of videotape wasn't just shown because it's in color and looks a whole lot more gory. It's because it shows more detail and more accurately what we were talking about in the

first stage of the trial. And while, perhaps, I couldn't refer to it in voir dire, you remember when I asked you in voir dire could you listen to that kind of proof, that you were going to see and hear some rather graphic evidence of wounds. Well, that's what I was talking about, the videotape.

You see, because that's not something I want to spring on somebody without warning them on the front end, [1575] even though it was a week ago. Because it shows very graphically how atrocious this crime was, how cruel it was, and how much depravity it showed. Some of the details especially in that picture—in that videotape, you can't see as well in the black and white picture. For instance, Charisse's right hand all knarled up in agony. And Lacie Jo's hand and Lacie Jo's eyes and the expression on her face some people refer to as the thousand yard stare because it's just sort of not focused.

We know that three people were stabbed, two of them to death and the third one virtually to death. The doctors cannot tell us who died first. They cannot tell us exactly in what order they died or exactly when they died. But we know from their testimony that Charisse, for instance, did not die immediately. This wasn't simply one gunshot wound to the head. It wasn't even one simple stab wound to the heart. You heard the doctor, it took all of them to kill her and it took some time to kill her.

Lacie Jo, perhaps, was the closest to going quickly, although hers, again, was by bleeding to death internally. It was the result of multiple stab wounds, the major one being the one that clipped the aorta.

We don't know which one saw the other one die because we don't know which one died first. We don't know which one he killed first. We don't know which one lost [1576] consciousness first. But they didn't happen at the same time. One of them saw the other one die. I don't know which is easier.]

Whether Charisse saw her children stabbed or not, we will never know. Or Lucie saw her mother stabbed, we will never know. Either way, is there anything more depraved? Is there anything more heinous? Is there anything more atrocious? Is there anything more cruel? Either a mother or baby seeing the other one stabbed to death?

But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and to his baby sister.

Is that heinous? Is that atrocious? Is it cruel? Can you think of anything more torturous than that? Is there anything more outrageous than that? The imagination cannot even think of anything worse than that.

If there has ever been a case of heinous, atrocious, cruel, and depraved murder, this has to be it. If this isn't it, there is no such thing. It can't be if this is not it. [1577] So those three aggravating circumstances, I submit to you, have been proven beyond a reasonable doubt and to a moral certainty. So then what do you do? You weigh it against the mitigating circumstances. This is not one of those situations where it's so easy to say you put them in scales and you weigh one side or the other. How do you weigh things like what you saw on the videotape? They don't weigh in ounces. They don't weigh in pounds.

This is something that has to go on—I was going to say in your own minds—but weighing aggravation and mitigation I'm not sure takes place in the mind. May be something that you have to weigh in your heart. But the Judge, I believe, will tell you that if you find there are aggravating circumstances, you must weigh them against the mitigating circumstances. The Court will tell you to

determine whether or not the aggravating circumstances are outweighed by the mitigating circumstances, and whether or not there are any mitigating circumstances that substantially outweigh the aggravating circumstances.

What are the mitigating circumstances? The mitigating circumstances as presented are that the defendant was a good worker with his father. He was not any trouble to his father or his mother. That could probably be said hopefully about most people. But keep in [1578] mind you may have seen something that even his parents didn't see. You are not to decide this case as his parents. You are to decide it as jurors of this community.

You may have seen something that either his parents did not see because he hid it from them or because as all parents do, you don't want to see it. But I submit to you that you have seen something different than what they saw. You saw a man who sat in this chair after taking an oath before God look at you all and lie. You saw a man who could do this. And could sit up there and not show remorse at all. You saw something that a parent could never see because a parent will never allow themselves to see that, and I don't blame them. I have children, I wouldn't believe it.

But you all are not here as his parents. You are here as jurors and citizens of the community with a social responsibility. You heard the testimony about him riding around, having a few beers and a little cocaine apparently, reading Playboy or whatever that magazine was. Dating a married woman is neither here nor there but it's things that his parents did not approve of. Things that his girlfriend did not approve of. Even she did not allow alcohol, let alone drugs, yet, he would do it and do it at her apartment. Would use cocaine, but of course he's not [1579] going to let his parents and/or his girlfriend know about that. There's a side to him that they have not seen, but you have seen it. You have seen it in this

courtroom. And you heard it as he described how she hit the wall.

That's the sort of thing you have got to weigh in this case, those mitigating circumstances against those aggravating circumstances. It's not you count up we've got three aggravating and they've got mitigation and therefore it's three to two or something like that. It's the sort of thing you've got to weigh in here. And you've got to decide this as citizens and as jurors. Because we all have a social obligation. Every indictment in the State of Tennessee that is ever returned ends with the same words, that is, that the offense was committed against the peace and dignity of the State of Tennessee. Every indictment, including the three indictments here. Because under our state law we guarantee every citizen peace and dignity. We fail miserably at it. We guarantee them peace and dignity, but we fail miserably at it. Because people do get killed. Because crime does occur.

But we're asking you as citizens of this county and of this state to do the best you can to make good on the guarantee that's contained actually in our State Constitution. And that is everyone is entitled to the peace and dignity of the State of Tennessee, including [1580] Charisse, Lacie, and Nicholas.

Because what you can accomplish by sentencing the defendant to death by electrocution may be more important than just this case. What are the reasons for sentencing someone to death by electrocution? Well, one of them is hopefully to deter others. Explain this is what happens if you do wrong, if you go out and get drunk and start using cocaine and get into trouble and give way to your darker desires, this is what happens so don't do that. You can argue about whether or not that works or not.

Another way is—another means of doing this is just out of trying to deter this particular defendant. We know if we sentence him to death by electrocution he will never do anything wrong again. At least we hope not. If he is

sentenced to death by electrocution, this will stop him from doing it again, and that is a valid reason for the death penalty.

But there is another reason as well. I don't really know what word to put on it. Other than it just seems right sometimes if someone can do something this bad, can take someone else's life like this, there is something inside the human soul that says it's just not right that he keeps living after what he did. And that's why I say when you go to weigh aggravation and mitigation, [1581] weigh it in here. Because that's where your sense of right and wrong is. Your sense of right and wrong is what tells you that this is wrong and it ought not to happen to anybody. And anybody who does that doesn't deserve to live. It's not right. It's not fair.

There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There obviously is nothing you can do for Charisse or Lacie Jo. But there is something you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer.

Thank you.

* * *

PROSECUTION'S REBUTTAL ARGUMENT SENTENCING PHASE

* * * *

[1590] MS. GARDNER: Ladies and gentlemen, this will [1591] be the last thing that any of the lawyers will have an opportunity to say to you. Just as in the previous portion of the trial, the State has the burden of proof. That's the reason I am talking to you last.

I don't doubt Mr. Garts' sincerity. Yes, he is here on the behalf of Pervis Payne. Mr. Henderson and I are here on behalf of two people who were unable to come into this courtroom today and, yes, we are here on their behalf, as well as the rest of the people in the State of Tennessee. Charisse Christopher and Lacie Jo Christopher and Nicholas Christopher didn't have anybody in their kitchen on June the 27th to fight for them. They could have used somebody there. They could have used somebody to fight for them then, maybe to have spared their lives. They didn't have it. It was just Pervis Payne and his big knife as he murdered the mother, and he murdered the little baby girl, and he tried to murder the little boy.

You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives. And I couldn't agree with Tom Henderson more, if this isn't a case for death by electrocution, then I don't know what is. Because that has to be the cruelest sight [1592] you will ever see.

This was not something some people came in from Hollywood and designed to try to offend you, to try to scare you, to try to shock you because you go to a movie to see something. Ladies and gentlemen, this was real

life that was taken, taken by Pervis Payne, Pervis Payne with his knife on June 27, 1987.

When you look around and when you go back to the jury room and you deliberate, and you try to weigh the aggravating circumstances, I want you to think about that tape. That videotape sizes it up. I want you to think about the two-year-old, little Lacie, and think about the close-up as it panned in on her back. A two-year-old child with stab wounds, six of the nine or the ten in her back. A child who never had a chance.

Mr. Garts talks about Pervis Payne and how well thought of he was in high school and how many people like him and love him. No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him [1593] goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby.

Mr. Garts says give compassion, think about Pervis Payne. He's sitting here for you to look at. Charisse Christopher and Lacie Jo are not. This is where they were and this is how they said goodbye to life.

And why? Through anything that they did? Through anything that they deserved? That they asked for?

No. Because for whatever reason, whether it was for drugs or whether it was for sex, or whether it was just because Pervis Payne felt like doing it that day, we know he did it. And not only did he do it, he did it over and over and over again with that knife. Not just once, not just an accident, but forty-one times into this young woman who had her whole life ahead of her, and her baby, right here, with the defendant's hat that she caught on her arm and that she drew her last breath with his hat under her arm.

Talk about what is an appropriate punishment. The law has set out what the appropriate punishment is in a case such as this and the aggravating circumstances. And I want to go through them one more time for you. I want you to think through them and to feel through them. Lacie Jo was two years old. The law says that if a victim is under the age of twelve years old and the defendant is [1594] over the age of eighteen, there's no question. That is uncontested. That is a given.

The second fact. That the defendant caused death or great bodily harm, the risk of it, to two or more people. Who were those people? Charisse Christopher was murdered. Lacie was murdered. And Nicholas came this close, but for excellent medical attention and people who thought fast and moved—seconds counted, and that's the reason Nicholas is an assault to murder victim and not for murder. So those two are beyond a shadow of a doubt, the Perry Mason statement, far beyond what the State even has to prove to you.

But I submit the one that is so overpowering and that you have seen probably in a way you will never forget is the videotape of that crime scene and of what Pervis Payne did to that family. He took them from a happy, normal, loving family to a bloody massacre, and left them for dead on June the 27th. It has to be the most heinous, the most atrocious, the cruellest thing you will ever witness. And you have witnessed it, you have seen it just as he saw it when he closed that door, with the exception of on that day Nicholas was lying there conscious in his blood. That's what we're dealing with.

Mr. Garts wants you to think about a good reputation, people who love the defendant and things about [1595] him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch

cartoons with him, a little one. These are the things that go into why is it especially cruel, heinous, and atrocious, the burden that that child will carry forever.

Mr. Garts has said that he is fighting for Pervis' life and he is fighting by himself. You have seen the type of job he has done in this case. No one could have any complaints of that. And you've heard him ask virtually every witness up here about have you talked with my investigators, the two people he has had a full command of that. He asked you not to have sympathy but by the same token, he asked you about that, not to hold it against him because he's been by himself or because of this or because of that. Well, I ask you to weigh this case just as you said you would during the voir dire and if you will remember the promise that you made.

There were numerous questions about if you get to the point where the State proves its case to you beyond a reasonable doubt and to a moral certainty, and if we get to the sentencing phase, can you weigh the aggravating [1596] circumstances. Not turn away from them but have the courage to look at them, and to weigh them against the mitigating circumstances. And if you find that they outweigh the mitigating circumstances, you can impose the sentence of death by electrocution. One that is fitting, one that is right, and one that suits the crime. One not to be taken lightly, but one to be imposed when the crime fits. And I submit to you that there has never been a case which it fit as this one, and you've seen it.

Mr. Garts would like to blame this entire ordeal on Barry Wiggins. I think you can see beyond that. Barry Wiggins was not with Pervis Payne at the time of this massacre. Pervis Payne was all by himself with the Christopher family. As far as we know, from what we have head in this record, there is nothing wrong with Barry Wiggins. So, to blame Barry Wiggins and to say he's the reason Pervis Payne did wrong, that's just not what the facts show. And I think you know it.

Mr. Garts wants you to turn the defendant over to the Department of Corrections. That's what he urges you to do. The State is urging you to impose a sentence of death by electrocution.

Mr. Garts says but Pervis Payne has lived an exemplary life for twenty years. Well, what about Charisse, for twenty-eight years? What about Lacie Jo, [1597] for two years? They lived exemplary lives. But they are not here with us anymore. This is a situation where you have to weigh what has happened.

Ladies and gentlemen of the jury, this is the last thing I am going to say to you. But I want you to think about this when you go back into your jury room. We have heard a lot about Charisse Christopher, Lacie Jo and Nicholas, and here they were as they appeared before Pervis Payne came into their lives. And this is what he did to them.

Did they deserve it? Are you going to let it go unpunished?

I submit you can't do that. We ask you to impose a sentence of death by electrocution.

Thank you.

THE COURT: Ladies and gentlemen, I'll now give you the instructions as to the law for the sentencing phase of this trial, the sentencing phase of murder in the first degree.

* * * *

IN THE CRIMINAL COURT OF TENNESSEE
 AT MEMPHIS
 30TH JUDICIAL DISTRICT

(Caption Omitted in Printing)

SENTENCING PHASE—MURDER FIRST DEGREE

Ladies and Gentlemen of the Jury, you have now found the defendant guilty beyond a reasonable doubt of Murder in the First Degree as charged in the indictment.

It is now your duty to determine within the limits prescribed by law, the penalty which shall be imposed as punishment for this offense. Tennessee Code Annotated § 39-2-202(b), provides that a person convicted of Murder in the First Degree shall be punished by death or by imprisonment for life.

In arriving at this determination, you are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt finding phase or the sentencing phase or both. The Jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdict, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

The burden of proof is upon the State to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt to a moral certainty.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict. Reasonable doubt does not

mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdict. The law makes you, the Jury, the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence.

Tennessee Code Annotated § 39-2-203(i) provides that no death penalty shall be imposed by a Jury but upon a unanimous finding of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

1. The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age or older.
2. The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.
3. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

“Heinous”

means grossly wicked or reprehensible; abominable; odious; vile.

“Atrocious”

means extremely evil or cruel; monstrous; exceptionally bad; abominable.

“Cruel”

means disposed to inflict pain or suffering; causing suffering; painful.

“Torture”

means the infliction of severe physical pain as a means of punishment or coercion; the

experience of this; mental anguish; any method or thing that causes such pain or anguish; to inflict with great physical or mental pain.

"Depravity"

means moral corruption; wicked or perverse act.

4. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.
5. The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

Tennessee Code Annotated, § 39-2-203(j), provides that in arriving at the punishment, the Jury shall consider as heretofore indicated, any mitigating circumstances which shall include but not be limited to the following:

1. The defendant has no significant history of prior criminal activity;
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
3. The victim was a participant in the defendant's conduct or consented to the act;
4. The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

5. The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;
6. The defendant acted under extreme duress or under the substantial domination of another person;
7. The youth or advanced age of the defendant at the time of the crime;
8. The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. The Jury shall state in writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify in writing that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.

You will write your findings and verdict upon the enclosed form attached hereto and made a part of this charge. Your verdict should be as follows:

- (1) We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances; (The Jury will then list the statutory aggravating circumstance or circumstances so found beyond a reasonable doubt.)
- (2) We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substan-

tial to outweigh the statutory aggravating circumstance or circumstances so listed above.

- (3) Therefore, we, the Jury, unanimously find that the punishment shall be death.

The verdict must be unanimous and each Juror must sign their name beneath the verdict.

If you unanimously determine that no statutory aggravating circumstance has been proved by the State beyond a reasonable doubt; or if the Jury unanimously determined that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt; but that said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.

The verdict should be as follows:

"We, the Jury, unanimously find that the punishment shall be life imprisonment."

The verdict must be unanimous and signed by each juror.

The Jury in no case, should have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdict. They should render their verdict with absolute fairness and impartiality as they think truth and justice dictate. Take the case, consider all the evidence fairly and impartially and report your verdict to the Court.

/s/ Bernie Weinman
Judge

For indictment #87-04409:

PUNISHMENT OF DEATH

- (1) We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

(Here list the statutory aggravating circumstance or circumstances so found, which shall be limited to those enumerated by the Court for your consideration.)

1. The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age or older.
2. The defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder.
3. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

- (2) We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstances or circumstances so listed above.

- (3) Therefore, we, the Jury, unanimously find that the punishment for the defendant, Pervis Tyrone Payne shall be death.

/s/ Frank T. Bartozzi
Jury Foreman

/s/ Louise Jones
Juror

/s/ Joe B. Key
Juror

/s/ Cathleen S. Hamilton
Juror

/s/ Brenda R. Hale
Juror

/s/ William J. Walker
Juror

/s/ Susan L. Daniels Juror	/s/ Rickey Taylor Juror
/s/ Forestine Traylor Juror	/s/ Randal G. Powell Juror
/s/ Katy L. Yarbrough Juror	/s/ Frank Fluker Juror

SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,

Appellee,

v.

PERVIS TYRONE PAYNE,

Appellant.

April 16, 1990

OPINION

FONES, Justice.

Defendant was found guilty of first degree murder of Charisse Christopher and her daughter, Lacie, and guilty of assault with intent to commit murder in the first degree of her son, Nicholas. He was given the death penalty for each of the murders and thirty (30) years for the assault with intent to commit murder offense.

Charisse Christopher was 28 years old, divorced, and lived in Hiwassee Apartments, in Millington, Tennessee, with her two children, three and one-half year old Nicholas and two and one-half year old Lacie. The building in which she lived contained four units, two downstairs and two upstairs. The resident manager, Nancy Wilson, lived in the downstairs unit immediately below the Christopher's. Defendant's girlfriend, Bobbie Thomas, lived in the other upstairs unit. The inside entrance doors of the Christopher and Thomas apartments were separated by a narrow hallway. Each of the upstairs apartments had back doors in the kitchen that led to an open porch over-

looking the back yard. In the center of the porch was a metal stairway leading to the ground. There was also an inside stairway leading to the ground floor hallway and front entrance to the four-unit building.

Bobbie Thomas had spent the week visiting her mother in Arkansas but was expected to return on Saturday, 27 June 1987, and she and Defendant had planned to spend the weekend together. Prior to 3:00 p.m. on that date, Defendant had visited the Thomas apartment several times and found no one at home. On one visit he left his overnight bag, containing clothing, etc., for his weekend stay, in the hallway, near the entrance to the Thomas apartment. With the bag were three cans of Colt 45 malt liquor.

Nancy Wilson was resting in her apartment when she first heard screaming, yelling and running in the Christopher apartment above her. She heard a door banging open and shut and Charisse screaming, "get out, get out." She said it wasn't as though she was telling the intruder to get out, it was like "children, get out." The commotion began about 3:10 p.m., subsided momentarily, then began again and became "terribly loud, horribly loud." She went to the back door of her apartment, went outside and started to go to the Christopher apartment to investigate, but decided against that, and returned to her apartment and immediately called the police. She testified that she told the police she had heard blood curdling screams from the upstairs apartment and that she could not handle the situation. The dispatcher testified he received her disturbance call at 3:23 p.m. and immediately dispatched a squad car to the Hiwassee Apartments. Mrs. Wilson went to her bathroom after calling the police. The shouting, screaming and running upstairs had stopped, but she heard footsteps go into the upstairs bath, the faucet turned on and the sound of someone washing up. Then she heard someone walk across the floor to the door of the Christopher apartment, slam the door shut and run down the steps, just as the police arrived.

Officer C.E. Owen, of the Millington Police Department, was the first officer to arrive at the Hiwassee Apartments. He was alone in a squad car when the disturbance call was assigned to Officers Beck and Brawell. Owen was only two minutes away from the Hiwassee Apartments so he decided to back them up. He parked and walked toward the front entrance. As he did so he saw through a large picture window that a black man was standing on the second floor landing of the stairwell. Owen saw him bend over and pick up an object and come down the stairs and out the front door of the building. He was carrying the overnight bag and a pair of tennis shoes. Owen testified that he was wearing a white shirt and dark colored pants and had "blood all over him. It looked like he was sweating blood." Owen assumed that a domestic fight had taken place and that the blood was that of the person he was confronting. Owen asked, "[H]ow are you doing?" Defendant responded, "I'm the complainant." Owen then asked, "What's going on up there?" At that point Defendant struck Owen with the overnight bag, dropped his tennis shoes and started running west on Biloxi Street. Owen pursued him but Defendant outdistanced him and disappeared into another apartment complex.

Owen called for help on his walkie-talkie and Officer Boyd responded. By that time Owen had decided Defendant was not hurt and the blood was not his own—he was running too fast. Owen told Boyd that "there's something wrong at that apartment." They returned to 4516 Biloxi. Nancy Wilson had a master key and let them in the locked Christopher apartment. As soon as the door was opened they saw blood on the walls, floor—everywhere. The three bodies were on the floor of the kitchen. Boyd discovered that the boy was still breathing and called for an ambulance and reported their findings to the chief of police and the detective division. A Medic Ambulance arrived, quickly confirmed that Charisse and Lacie were dead, and departed with Nicholas.

He was taken to Le Bonheur Children's Hospital in Memphis and was on the operating table there from 6:00 p.m. until 1:00 a.m., Sunday, 28 June. In addition to multiple lacerations, several stab wounds had gone completely through his body from front to back. One of those was in the middle of his abdomen. The surgeon, Dr. Sherman Hixson, testified that he had to repair and stop bleeding of the spleen, liver, large intestine, small intestine and the vena cava. During the surgery he was given 1700 cc's of blood by transfusion. Dr. Hixson estimated that his normal total blood volume should have been between 1200 and 1300 cc's. He was in intensive care for a period and had two other operations before he left the hospital, but he survived.

Charisse sustained forty-two (42) knife wounds and forty-two (42) defensive wounds on her arms and hands. The medical examiner testified that the forty-two (42) knife wounds represented forty-one (41) thrusts of the knife, "because there was one perforated wound to her left side that went through her—went through her side. In and out wounds produce two." He said no wound penetrated a very large vessel and the cause of death was bleeding from all of the wounds: there were thirteen (13) wounds "that were very serious and may have by themselves caused death. I can't be sure, but certainly the combination of all the wounds caused death." He testified that death probably occurred within, "maybe 30 minutes, that sort of time period," but that she would have been unconscious within a few minutes after the stabbing had finished.

The medical examiner testified that the cause of death of Lacie Christopher was multiple stab wounds to the chest, abdomen, back and head, a total of nine. One of the wounds cut the aorta and would have been rapidly fatal.

Defendant was located and arrested at a townhouse where a former girlfriend, Sharon Nathaniel, lived with

her sisters. Defendant had attempted to hide in the Nathaniel attic. When arrested he was wearing nothing but dark pants, no shirt, no shoes. As he descended the stairs from the attic he said to the officers, "Man, I ain't killed no woman." Officer Beck said that at the time of his arrest he had "a wild look about him. His pupils were contracted. He was foaming at the mouth, saliva. He appeared to be very nervous. He was breathing real rapid." A search of his pockets revealed a "pony pack" with white residue in it. A toxicologist testified that the white residue tested positive for cocaine. They also found on his person a B & D syringe wrapper and an orange cap from a hypodermic syringe. There was blood on his pants and on his body and he had three or four scratches across his chest. He was wearing a gold Helbrose wrist-watch that had bloodstains on it. The weekend bag that he struck Officer Owen with was found in a dumpster in the area. It contained the bloody white shirt he was wearing when Owen saw him at the Hiwassee Apartments, a blue shirt and other shirts.

It was stipulated that Charisse and Lacie had Type O blood and that Nicholas and Defendant had Type A. A forensic serologist testified that Type O blood was found on Defendant's white shirt, blue shirt, tennis shoes and on the bag. Type A blood was found on the black pants Defendant was wearing when seen by Owen and when arrested. Defendant's baseball cap had a size adjustment strap in the back with a U-type opening to accommodate adjustments. That baseball cap was on Lacie's forearm —her hand and forearm sticking through the opening between the adjustment strap and the cap material. Three Colt 45 beer cans were found on a small table in the living room, two unopened, one opened but not empty, bearing Defendant's fingerprints, and a fourth empty beer can was on the landing outside the apartment door. Defendant was shown to have purchased Colt 45 beer earlier in the day. Defendant's fingerprints were also found on the telephone and counter in the kitchen.

Charisse's body was found on the kitchen floor on her back, her legs fully extended. The right side of her upper body was against the wall, and the outside of her right leg was almost against the back door that opened onto the back porch. Laura Picard was visiting her sister, Helen Truman, who lived in the downstairs apartment across from Nancy Wilson. She was sunbathing in the back yard and heard a noise like a person moaning coming from the Christopher apartment followed by the back door slamming three or four times, "but it didn't want to shut. And this hand, a dark-colored hand with a gold watch, kept trying to shut that back door." It was about that time that Nancy Wilson came out of her back door looking around. Mrs. Picard testified that she knew the manager was looking for the source of the noise and when Mrs. Wilson looked at her she pointed to the Christopher apartment. She said that it was just a few minutes later that the police arrived. She did not have a watch on at the time. She testified that the dark-colored hand she saw three or four times was at a level between the door knob and the bottom of the door.

The medical examiner testified that Charisse was menstruating and a specimen from her vagina tested positive for acid phosphatase. He said that result was consistent with the presence of semen, but not conclusive, absent sperm, and no sperm was found. A used tampon was found on the floor near her knee. The murder weapon, a bloody butcher knife, was found at the feet of Lacie, whose body was also on the kitchen floor near her mother. A kitchen drawer nearby was partially open.

Defendant testified. His defense was that he did not harm any of the Christophers; that he saw a black man descend the inside stairs, race by him and disappear out the front door of the building, as he returned to pick up his bag and beer before proceeding to his friend Sharon Nathaniel's to await the arrival of Bobby Thomas. He said that as the unidentified intruder bounded down the stairs, attired in a white tropical shirt

that was longer than his shorts, he dropped change and miscellaneous papers on the stairs which Defendant picked up and put in his pocket as he continued up the stairs to the second floor landing to retrieve his bag and beer. When he reached the landing he heard a baby crying and a faint call for help and saw the door was ajar. He said curiosity motivated him to enter the Christopher apartment and after saying he was "coming in" and "eased the door on back," he described what he saw and his first actions as follows:

I saw the worst thing I ever saw in my life and like my breath just had—had taken—just took out of me. You know, I didn't know what to do. And I put my hand over my mouth and walked up closer to it. And she was looking at me. She had the knife in her throat with her hand on the knife like she had been trying to get it out and her mouth was just moving but words had faded away. And I didn't know what to do. I was about ready to get sick, about ready to vomit. And so I ran closer—I saw a phone on the wall and I lift and got the phone on the wall. I said don't worry. I said don't worry. I'm going to get help. Don't worry. Don't worry. And I got ready to grab it—the phone but I didn't know no number to call. I didn't know nothing. I didn't know nothing about no number or—I just start trying to twist numbers. I didn't know nothing. And she was watching my movement in the kitchen, like she—I had saw her. It had been almost a year off and on in the back yard because her kids had played with Bobbie's kids. And I have seen her before. She looked at me like I know you, you know. And I didn't know what to do. I couldn't leave her. I couldn't leave her because she needed—she needed help. I was raised up to help and I had to help her.

He described how he pulled the knife out of her neck, almost vomited, then kneeled down by the baby girl, had

the feeling she was already dead; said the little boy was on his knees crying, he told him not to cry, he was going to get help. His explanation of the blood on his shirt, pants, tennis shoes, body, etc., was that when he pulled the knife out of her neck, "she reached up and grab me and hold me, like she was wanting me to help her . . .", that in walking and kneeling on the bloody floor and touching the two babies he got blood all over his clothes. He said he went to the kitchen sink, probably twice, to get water to drink when he thought he was going to vomit, but he denied that he went into the bathroom at any time or used the bathroom lavatory to wash up, as Nancy Wilson testified she heard someone do after the violence subsided.

He was then suddenly motivated to leave and seek help and he described his exit from the apartment as follows:

And I left. My motivation was going and banging on some doors, just to knock on some doors and tell someone need help, somebody call somebody, call the ambulance, call somebody. And when I—as soon as I left out the door I saw a police car, and some other feeling just went all over me and just panicked, just like, oh, look at this. I'm coming out of here with blood on me and everything. It going to look like I done this crime.

The shoulder strap on the left shoulder of the blue shirt he was wearing while in the victim's apartment was torn, a fact he did not seem to realize and could not remember when it happened. He said he ran because the officer did not seem to believe him. He claimed that he had the Colt 45 beer with him as he ran; that the open can with beer in it spilled into the sack, as he ran from Owen, the bottom of the sack broke, the beer and tennis shoes were scattered along his route. He said that what witnesses had described as scratches were stretch marks from lifting weights.

Defendant presented five character witnesses who testified that Defendant's reputation for truth and veracity was good. Ruth Wakefield Bell testified that she had known Defendant all of his life. She was age 40 and lived in the same block on Biloxi as the Hiwassee Apartments, across the street. She said that on the Saturday afternoon of the murders, Defendant knocked on her door, identified himself and she looked out her bedroom window and saw him, but she did not let him in—she was upset with her boyfriend and did not want to see or "entertain" anyone. She denied that she was afraid to let him in—or that there was anything unusual about his appearance. She estimated that it was about twenty minutes after he knocked on her door that she saw police cars and an ambulance across the street. Defendant testified that he knocked on her door just before he decided to go to Sharon Nathaniels and went in the Hiwassee Apartments to pick up his bag and beer.

During the cross-examination of Defendant, he was asked and answered as follows:

Q. Can you explain why there's bloodstains on your left leg?

A. Left leg?

Q. Yes, sir.

A. Evidently it probably came—had to come from when she—when she hit the wall. When she reached up and grabbed me.

Q. When she hit the wall?

A. When she—when she hit—when she hit when I got ready to run up—when I got ready to vomit.

Q. When she hit the wall she got blood on you?

A. When she splashed. It was blood—a lot of blood on the floor.

Q. She got blood on you when she hit the wall. Is that what you said?

A. She hit against the wall when she fell back.

Q. Is that what you said, sir, that she got blood on you when she hit the wall?

A. I didn't say she got blood on me when she hit the wall.

Q. Isn't that what you said just a moment ago, sir?

A. That ain't—that's not what I said.

Blood was smeared on the wall of the kitchen next to the back door and on the door itself, from doorknob height to the floor and laterally approximately six or seven feet.

Defendant insists that the evidence is wholly circumstantial and is insufficient to support the verdict.

From the evidence in this case the jury could have found that Defendant was under the influence of cocaine or intoxicated from drinking beer and Geritol, both of which he admitted purchasing and drinking. He was unable to account for the expenditure of \$30 to \$50 of the sums that he withdrew from the bank on Friday and Saturday morning, and the State's theory was that he spent it for cocaine and used the syringe he purchased to administer it. Defendant and his friend Sylvester Robinson were cruising around the area looking at Playboy magazine containing sexually stimulating pictures and material. By 3:00 p.m. he had visited all the friends and acquaintances he had in the area, waiting for the return of Ms. Thomas, and the jury could have found that he decided to visit her next door neighbor to get a drink of water because he had obtained one earlier in the day from the Truman apartment, downstairs, or to use the telephone, etc. Once inside the evidence justifies the inferences that he made sexual advances, they were re-

sisted and violence erupted. Obviously, Charisse fought her assailant with every ounce of resistance she could muster and tried to get out the back door, but the "dark colored hand" with a gold wrist watch on the arm prevented her from escaping. Her blood was smeared all over that door and the wall next to it. It is safe to conclude that she did not remove the tampon. There was no evidence that anything was missing from the Christopher apartment. So we may also conclude that robbery was not the objective of the murderer's presence.

The testimony of Laura Picard and Nancy Wilson, the time of Mrs. Wilson's call to the police and Officer Owens' arrival virtually foreclose the possibility that an unidentified intruder committed these murders and disappeared out the front door before Defendant entered the apartment. Defendant was the person that washed up in the upstairs bathroom, walked out of the apartment, locked the door, and encountered Officer Owen with his bag and beer. He was the person that Owen described as looking like "he was sweating blood." Also, the jury was justified in rejecting as unbelievable and contrary to human conduct and experience, his alleged efforts to render aid to the Christophers. We find the evidence sufficient to convince any rational trier of fact that Defendant was guilty of murder in the first degree beyond any reasonable doubt, in accord with the standards prescribed in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and T.R.A.P. 13(e).

Next, Defendant insists that the trial judge erred in refusing to suppress evidence of his possession of illegal narcotics and drug paraphernalia, when the State had not complied with the discovery requirements of Tenn.R. Crim.P. 16.

Defendant filed pretrial motions for discovery and inspection and the production of exculpatory evidence. About a week and a half before 8 February 1988, the date of trial, the State learned from the Millington Police

Department of the availability of certain physical evidence--the hypodermic syringe wrapper, the paper with the cocaine residue, and the syringe cap taken from Defendant when he was arrested. This evidence had apparently been in the custody of the Millington police since June 1987. The State immediately informed defense counsel of this evidence, which both the State and defense counsel inspected for the first time on 3 February 1988. The next day Defendant moved for suppression of the evidence and on 5 February 1988, the paper with the residue was sent to the University of Tennessee for testing. That same day, after a hearing, the trial court refused to suppress the evidence because of its failure to be produced earlier. At the hearing, defense counsel expressly stated he did not want to run any independent tests.

Although Defendant argues that one could infer from certain omissions by the Millington police that the police were deliberately covering up this evidence because it was mitigating, there is no indication that the State or the police were acting in bad faith or in intentional disregard of the rules of discovery. Where there has been non-compliance with Rule 16, the trial court has discretion to fashion a remedy based upon the circumstances of the case. *State v. Cadle*, 634 S.W.2d 623, 625 (Tenn. Crim.App.1982). Evidence should not be excluded for non-compliance except when it is shown that Defendant is actually prejudiced by the State's failure and the prejudice cannot otherwise be eradicated. *State v. James*, 688 S.W.2d 463, 466 (Tenn.Crim.App.1984). In light of defense counsel's knowledge of and inspection of the evidence almost a week before trial and his statement that he was ready for trial and did not want a continuance, the trial court's refusal to exclude the evidence for any violation of Rule 16 was not error.

Defendant says the evidence of his possession of cocaine and drug paraphernalia was inadmissible proof of

other crimes and that its prejudicial effect outweighed its probative value.

Defendant argues that the questioned evidence was not relevant to, and was a crime independent of, the homicide prosecution. On the contrary, the evidence indicating that Defendant was under the influence of cocaine was proof directly related to and explanatory of the circumstances of the murders and relevant to Defendant's mental state during the commission of these offenses. That evidence meets the test prescribed in Rule 401, Federal Rules of Evidence adopted by this Court in *State v. Banks*, 564 S.W.2d 947, 949 (Tenn.1978). Considering the inexplicable brutality with which these crimes were committed it is more probable than not, that the murderer was under the influence of drugs or alcohol or both, and evidence that Defendant had access to both drugs and alcohol was relevant and probative of his guilt. See *State v. Zagorski*, 701 S.W.2d 808, 813 (Tenn.1985).

Defendant complains of the irrelevance of the introduction of a child's toy stuffed animal and a pair of children's shoes found at the crime scene. No objection was made at the time of the admission of those articles as part of the testimony of the investigating detective describing the crime scene. Nevertheless, defendant asks that we consider this issue on its merits. We have. We find the evidence irrelevant and harmless beyond a reasonable doubt.

All of the remaining issues raised by defendant involve alleged errors that occurred during the sentencing phase of the trial.

At sentencing the State presented only two witnesses, Mary Zvolanek, Charisse's mother and Detective Sammy Wilson of the Millington Police Department. Mrs. Zvolanek testified very briefly about how her grandson, Nicholas, cried for his mother and sister and could not understand what had happened. Detective Wilson was one of two detectives that conducted the investigation of these

crimes. He testified at the guilt phase of the trial and was recalled at the sentencing phase to identify a videotape that he had made of the crime scene. He did so and the tape was played for the jury, over objection.

Defendant presented the testimony of four witnesses at the sentencing phase of the trial, his mother and father, Bobbie Thomas, and Dr. John T. Hutson.

Bobbie Thomas testified that she joined Defendant's father's church and became acquainted with Defendant; that she had a troubled marriage, was abused by her husband and it had a bad effect upon her three children; that Defendant was a very caring person and the time and attention he had devoted to her children had "got them back to their old self." She said she did not drink or use drugs and neither did Defendant; that it was inconsistent with Defendant's character to have committed these crimes.

Dr. Hutson is a clinical psychologist, who specializes in criminal court evaluation work. He gave Defendant the Wechsler Adult Intelligence Scale (WAIS) revised version. Defendant's scores were Verbal IQ 78, Performance IQ 82, with a variance of plus or minus 3 on the Verbal and plus or minus 4 on the Performance. He testified that the theoretical norm is 100, that actual test results have moved the norm close to 110; that historically the mental retardation score was 75, but "retardation" is not commonly used anymore. He preferred mentally handicapped. He also gave Defendant the Minnesota Multiphasic Personality Inventory (MMPI). That test consists of 566 questions that tests a number of different things, that give insight into personality functioning, responses to stress and physical performance. Various "scales" measure lying or faking, hypochondria, depression, hysteria, psychopathic deviance, sexuality, paranoia, cyclothymia, schizophrenia and mania. The tests are graded by computer. Dr. Hutson testified that Defendant was in a normal range or near normal range, with

the exception of intelligence and schizophrenia. He said that Defendant "was actually lower intellectually than I had anticipated. And he is low enough that I consider it significant." He testified that Defendant scored above the normal—which is moving toward psychotic—but that in his opinion Defendant was not psychotic or schizophrenic—that that scale of the MMPI, "has a racial bias to it. Blacks tend to look higher on it when actually its very normal for them." The testing was performed in October, about three months after the murders. Dr. Hutson described Defendant as "somewhat naive" and one of the most polite individuals he had ever interviewed in jail.

Defendant's parents testified that Defendant had no prior criminal record, had never been arrested and had no history of alcohol or drug abuse; that he worked with his father as a painter, was good to children and a good son.

Defendant insists that testimony of Nicholas Christopher's grandmother regarding his reaction to the loss of his mother and sister, was inflammatory "victim impact" evidence in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

The evidence complained of consisted of Mrs. Zvolanek's answer to one question. The question and answer are as follows:

Q. Ms. Zvolanek, how has the murder of Nicholas's mother and his sister affected him?

A. He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He come to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell yes. He says, I'm worried bout my Lacie.

In *Booth v. Maryland*, *supra*, the Court said that "victim impact statements" provide two types of irrelevant

information that create a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. The first type describes the personal characteristics of the victims and the emotional impact of the crimes on the family. The second type describes the family members opinions and characterizations of the crimes and the defendant. Mrs. Zvolanek's brief answer contains only a matter-of-fact statement that a four-year-old boy misses and cries for his mother and sister. (This case was tried approximately seven months after the crimes were committed). The VIS in *Booth* covered the full range of the two types of irrelevant information described above and was more extensive and inflammatory than the above quoted answer of Nicholas' grandmother. While technically irrelevant, that statement did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty, and was harmless beyond a reasonable doubt.

Defendant also contends that comments were made in the State's closing argument that violate *Booth*. Since this case was tried (February 1988) the United States Supreme Court has extended its condemnation of victim impact evidence to comments by the prosecution, in final argument, on personal qualities of the victim, and reading a so-called religious tract, couched in sporting parlance, seeking God's help in playing the game of life as a good sport should, a possession of the victim. As in *Booth*, the majority found that the prosecution had focused upon considerations not relevant to Defendant's "personal responsibility and moral guilt." *South Carolina v. Gathers*, — U.S. —, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

Defendant's brief quotes from the transcript the portions of the State's closing argument said to violate the Eighth Amendment to the United States Constitution, as follows:

But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still

conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and to his baby sister.

Is that heinous . . . (XVIII, 1576).

There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There obviously is nothing you can do for Charisse or Lacie Jo. But there is something you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer. (XVIII, 1581) . . .

You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives. . . . (XVIII, 1591).

. . . And there won't be anybody there—there won't be his mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby. (XVIII, 1592-1593).

. . . Mr. Garts wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the

people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for here every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why is it especially cruel, heinous, and atrocious, the burden that that child will carry forever. (XVIII, 1594-1595).

. . . Mr. Garts says but Pervis Payne has lived an exemplary life for twenty years. Well, what about Charisse, for twenty-eight years? What about Lacie Jo, for two years? They lived exemplary lives. But they are not here with us anymore. (XVIII, 1596-1597).

We are of the opinion that the prosecutor's argument is relevant to this defendant's personal responsibility and moral guilt. When a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight year old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his "blameworthiness."

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

This case was tried more than a year before *Gathers* was released but *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) apparently commands that we apply *Gathers* retroactively. However, we are of the opinion that the argument did not violate either *Gathers* or *Booth*.

Finally, we are of the opinion that assuming the argument here violated the Eighth Amendment, as interpreted by the United States Supreme Court, we think it subject to harmless error analysis. See *State v. Alley*, 776 S.W.2d 506, 513 (Tenn.1989). The "personal responsibility", the "moral guilt" and the "blameworthiness" of the person who committed these crimes, was established by the proof at the guilt phase, to-wit, that inhuman brutality, without reason or explanation was heaped upon three innocent human beings. Once that person's identity was established by the jury's verdict, the death penalty was the only rational punishment available. Thus, the State's argument was harmless beyond a reasonable doubt.

This issue is without merit.

Defendant asserts that the trial judge erred in allowing the State, over objection, to show the jury, at the sentencing, a videotape of the crime scene.

Detective Wilson made a videotape, about ten minutes in length, and the State was permitted to show the jury the first two minutes, approximately, of that tape. The part shown was the scene in the kitchen where Charisse and Lacie's bodies were found, and had not been moved when the video was made. Nicholas, of course, had been taken to the hospital.

Defendant says the video was gruesome and graphic and was "unfairly prejudicial." Defendant asks this Court to apply the test in *State v. Banks*, 564 S.W.2d 947 (Tenn.1978) to photographs and videos offered at the sentencing stage. Acknowledging that the weighing process where, as here, the State relies upon the aggravating circumstance as heinous, atrocious, or cruel would be different than at the guilt phase—Defendant proposes that we weigh probative value versus prejudicial effect, allow "prejudicial evidence which is relevant" but exclude "unfairly prejudicial" evidence.

The State insists that the video was relevant to the aggravating circumstances, heinous, atrocious, or cruel because it depicts the number and severity of the wounds, the savagery of the attack and the desperate struggle of Charisse to escape the repeated stab wounds.

The video was relevant to the State's contention that the murder was heinous, atrocious or cruel, and its probative value on that issue outweighed any prejudicial effect. See *State v. Porterfield*, 746 S.W.2d 441 (Tenn. 1988) and *State v. Teague*, 645 S.W.2d 392 (Tenn.1983).

Defendant contends that the trial judge's instruction to the jurors that they should not "have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdict," violated his rights under the Eighth Amendment, United States Constitution.

We rejected this issue in *State v. Porterfield*, 746 S.W.2d 441, 450 (Tenn.1988) in reliance upon *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). Jurors are repeatedly told in criminal trials, and were in this trial, that they are to decide the case on the "law and the evidence," without sympathy, prejudice, and similar distractions. The emphasis was not on "anti-sympathy" but on the necessity to key the focus on the law and the evidence. There is no merit to this issue.

Defendant contends the prosecution committed error in expressing the personal opinion that ". . . I could not agree with Tom Henderson more, if this isn't a case for death by electrocution, then I don't know what is . . ."

It is a violation of the Code of Professional Responsibility, DR 7-106(C) (4) for lawyers engaged in trial to express their personal opinion about any issue involved in the justice of the cause they represent. This Court has repeatedly condemned such conduct. See e.g. *State v. Johnson*, 743 S.W.2d 154, 159 (Tenn.1987) and *State v. Hicks*, 618 S.W.2d 510, 516, 517 (Tenn.Crim.App.1981).

However, insofar as its effect upon Defendant's rights, it is ineffective, as well as unprofessional, and in this case was harmless beyond a reasonable doubt.

Defendant also complains that the same assistant district attorney committed an inflammatory act during closing argument at the sentencing hearing.

The argument that accompanied the act was as follows:

Ladies and gentlemen of the jury, this is the last thing I am going to say to you. But I want you to think about this when you go back into your jury room. We have heard a lot about Charisse Christopher, Lacie Jo and Nicholas, and here they were as they appeared before Pervis Payne came into their lives. And this is what he did to them.

Did they deserve it? Are you going to let it go unpunished.

As the prosecutor said, "And this is what he did to them," she approached Exhibit 24, a large diagram of Nicholas Christopher's body, and stabbed a hole through it with Exhibit 25, the butcher knife found between Charisse and Lacie's bodies. Defendant contends that the stabbing act was calculated to inflame the passions of the jury. We are of the opinion that it was an improper argument, an improper, unprofessional act and an improper use of exhibits. Whether it was "calculated" to inflame the jury or did in fact inflame the jury is debatable. The jury may also have regarded the action as improper. We find the prosecutor's action harmless beyond a reasonable doubt.

Defendant contends that the trial judge's instructions could have led the jury to believe that they were required to vote for the death penalty unless they unanimously agreed on a mitigating circumstance which outweighed the aggravating circumstances. Defendant relies on *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) in support of his contention that the instruc-

tion violated the Eighth Amendment, United States Constitution. We rejected this contention in *State v. Thompson*, 768 S.W.2d 239 (Tenn.1989).

Defendant contends that the trial judge should have instructed the jury that they must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that they must find beyond a reasonable doubt that the death penalty was appropriate in the present case. Defendant says the trial judge's instruction was inadequate in this case and his Eighth and Fourteenth Amendment rights were violated.

The trial judge instructed the jury that the burden of proof was on the State to prove any statutory aggravating circumstances beyond a reasonable doubt, and gave a definition of reasonable doubt. In *State v. Porterfield, supra*, the same charge was given and we rejected this same issue, advanced by Porterfield.

Defendant contends that the trial judge instructed the jury that "*the sentence shall be death*." Defendant is mistaken, no such charge was given. He has lifted a phrase out of context. We have held that this same charge does not make the death penalty mandatory, as erroneously contended by Defendant. See e.g. *State v. Wright*, 756 S.W.2d 669, 674 (Tenn.1988); *State v. Teague, supra*.

Defendant contends that the trial judge should have instructed the jury to presume that Defendant would actually serve a life sentence, if the jury verdict was life instead of the death penalty. We have rejected this identical contention in *State v. Melson*, 638 S.W.2d 342 (Tenn. 1982). The after-effect of a jury's deliberation is not a proper instruction for, or consideration, by the jury. See *Houston v. State*, 593 S.W.2d 267, 278 (Tenn. 1980).

Defendant contends the Tennessee death penalty statute is unconstitutional, acknowledging that we have re-

peatedly rejected the same issues he presents. We adhere to our previous opinion holding the statute constitutional.

Defendant contends that the Eighth and Fourteenth Amendments, United States Constitution are violated by Tenn. Code Ann. § 39-2-203(g), which states that if the jury determines that the aggravating circumstance or circumstances proved by the State beyond a reasonable doubt are *not outweighed* by any mitigating circumstances, the sentence *shall* be death.

We addressed this same argument in *State v. Thompson*, 768 S.W.2d 239, 251, 252 (Tenn.1989). We concluded that the statute did not violate the Eighth Amendment.

Defendant cites the recent case of *Adamson v. Rickerts*, 865 F.2d 1011 (9th Cir.1988) in which the Ninth Circuit Court of Appeals held the Arizona death penalty statute unconstitutional because it was said to place the burden on Defendant to prove the existence of mitigating circumstances substantial enough to warrant leniency. The Arizona statute differs from the Tennessee statute and we are content to adhere to our analysis and holding in *State v. Thompson, supra*. Likewise we are not persuaded that the legislature's revision of Tenn. Code Ann. § 39-2-203(g), (now Tenn. Code Ann. § 39-13-203(g)) requires that we depart from *Thompson*.

Pursuant to Tenn.Code Ann. § 39-13-205 we have reviewed the sentence of death and are of the opinion that it was neither excessive nor disproportionate to the penalty imposed in similar cases.

The conviction of murder in the first degree and the sentence of death will be carried out on the 18th day of July, 1990, unless stayed by appropriate authority.

SUPREME COURT OF THE UNITED STATES

No. 90-5721

PERVIS TYRONE PAYNE,
Petitioner

v.

TENNESSEE

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 2 presented by the petition.

In addition to the Question 2 presented by the petition, the parties are requested to brief and argue whether *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), should be overruled.

The petitioner's opening brief is to be served and filed with the Clerk on or before March 18, 1991. Respondent's brief is to be served and filed with the Clerk on or before April 8, 1991. The case is set for oral argument during the April session.

Justice Stevens, with whom Justice Marshall and Justice Blackmun join, dissenting: In my opinion, the Court's

decision to expedite the consideration of this case and to ask the parties to address whether we should overrule *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989), a question presented neither in the petition for certiorari nor in the response, is both unwise and unnecessary. Cf. *Patterson v. McLean Credit Union*, 485 U.S. 617, 622-623 (1988) (Stevens, J., dissenting). Moreover, the Court's decision to review the alleged *Booth* error in this case would be inappropriate in any event because the decision below rested alternatively on the ground that any *Booth* violation that might have occurred was harmless beyond a reasonable doubt. See *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990). Accordingly, I respectfully dissent.

February 19, 1991

As Amended

Supreme Court, U.S.

FILED

(5)
15

MAR 20 1991

OFFICE OF THE CLERK

No. 90-5721

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PERVIS TYRONE PAYNE,
Petitioner,

v.

TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

BRIEF OF PETITIONER

J. BROOKE LATHRAM *
LES JONES
130 North Court Avenue
Memphis, Tennessee 38103
(901) 523-2311

* Counsel of Record

Counsel for Petitioner

41812

QUESTIONS PRESENTED

1. Whether the Court, having twice decided in the last five years that the use of unforeseeable victim impact information in a capital sentencing trial violates the Eighth Amendment, should now overrule its previous decisions?
2. Whether Petitioner's death sentence should be vacated because of the State's use of information of the type condemned in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989) ?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINION OF THE COURT BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	11
I. THE VICTIM IMPACT INFORMATION USED IN THIS CASE IS OF THE TYPE CON- DEMNED IN <i>BOOTH AND GATHERS</i>	11
II. ON PRINCIPLES OF STARE DECISIS, THE COURT SHOULD DECLINE TO OVERRULE <i>BOOTH AND GATHERS</i>	15
III. THE COURT'S RULINGS IN <i>BOOTH AND</i> <i>GATHERS</i> ARE NECESSARY TO PRE- SERVE FUNDAMENTAL EIGHTH AMEND- MENT SAFEGUARDS	18
A. <i>Booth and Gathers</i> follow logically from the Court's earlier decisions	18
B. A more detailed examination of the conse- quences of overruling <i>Booth and Gathers</i> further demonstrates that these decisions are necessary to preserve the Eighth Amend- ment's safeguards against disproportionate punishment and arbitrary classifications.....	21
IV. THE JUSTIFICATIONS ADVANCED FOR OVERRULING <i>BOOTH AND GATHERS</i> SHOULD BE REJECTED	24

TABLE OF CONTENTS—Continued

	Page
A. Victim impact information of the type challenged here not only fails to promote, but actually undermines, the penological objective of retribution	25
B. That the law, in other contexts, allows punishment to depend upon the unforeseeable consequences of the offender's conduct does not justify the use of unforeseeable victim impact information in capital sentencing trials	29
1. Legislatures, in making distinctions among punishments for different types of offenses, often make presumptions that the harm caused by the offense generally is indicative of the actor's intent. In those instances in which legislatures make punishment distinctions based solely on the harm caused by actor's conduct, they do so on the basis of the harm to society in general, and not on the basis of the harm suffered by individuals in particular	29
2. The use of unforeseeable victim impact information in non-capital cases may often be justified by the information's relevance to restitution. Furthermore, the use of irrelevant information to enhance punishment in non-capital cases seldom, if ever, violates the Eighth Amendment	31
C. The use of unforeseeable victim impact information in a capital sentencing trial cannot be justified on the grounds that it is relevant to rebut mitigating evidence offered by the defendant	33
V. THE STATE'S USE OF VICTIM IMPACT EVIDENCE DID NOT CONSTITUTE HARMLESS ERROR	34
CONCLUSION	35

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Appeal of Portsmouth Savings Bank Corporators</i> , 525 A.2d 671 (N.H. 1987)	17
<i>Arizona v. Rumsey</i> , 467 U.S. 203 (1984)	16
<i>Booth v. Maryland</i> , 482 U.S. 496 (1987)	<i>passim</i>
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985)	19, 32
<i>California v. Brown</i> , 479 U.S. 538 (1987)	20, 24, 28
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	34
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	19, 20, 33
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	19
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	20, 21
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977)	32
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980)	21
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	25, 26, 27
<i>Henderson v. State</i> , 234 Ga. 827, 218 S.E.2d 612 (1975)	22
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	19, 33
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	23
<i>Orozco v. Texas</i> , 394 U.S. 324 (1969)	16
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	16
<i>Satterwhite v. Texas</i> , 486 U.S. 249 (1988)	34
<i>Smith v. Allwright</i> , 321 U.S. 649 (1944)	16
<i>South Carolina v. Gathers</i> , 490 U.S. 805 (1989)	<i>passim</i>
<i>State v. Gaskins</i> , 284 S.C. 105, 326 S.E.2d 132, cert. denied, 471 U.S. 1120 (1985)	22
<i>State v. Oliver</i> , No. 49613 (Ohio Ct. App. Oct. 17, 1985) (LEXIS, states library, Ohio file)	22
<i>Tennessee v. Payne</i> , 791 S.W.2d 10 (1990)	<i>passim</i>
<i>Thompson v. Oklahoma</i> , 487 U.S. 815 (1988)	26, 27
<i>Thornburg v. American College of Obstetricians and Gynecologists</i> , 476 U.S. 747 (1986)	17, 18
<i>Turner v. Murray</i> , 476 U.S. 28 (1986)	23
<i>Weems v. United States</i> , 217 U.S. 349 (1910)	19
<i>Welch v. Texas Department of Highways and Pub- lic Transportation</i> , 483 U.S. 468 (1987)	16
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	23
CONSTITUTIONAL PROVISIONS:	
United States Constitution:	
Eighth Amendment	2
Fourteenth Amendment	2

TABLE OF AUTHORITIES—Continued

STATUTES:	Page
18 U.S.C. § 351	26
28 U.S.C. § 1257(3)	1
Tenn. Code Ann. § 39-1-203(g) (1987 Supp.)	6
Tenn. Code Ann. § 38-13-204(g)(2)(B) (1990 Supp.)	6

ARTICLES AND TREATISES:

B. Cardozo, <i>The Nature of the Judicial Process</i> 149 (1921)	16, 17
Hillenbrand & Smith, <i>Victims Rights Legislation: An Assessment of Its Impact on Criminal Justice Practitioners and Victims</i> , 1989 A.B.A. Sec. Crim. Just. 71	31-32
Schwartz and Wishingrad, <i>The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine</i> , 24 Buffalo L. Rev. 783 (1975)	19

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1990

No. 90-5721

PERVIS TYRONE PAYNE,
Petitioner,
v.

TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

BRIEF OF PETITIONER

OPINION OF THE COURT BELOW

Tennessee v. Payne, 791 S.W.2d 10 (1990).

STATEMENT OF JURISDICTION

The judgment of the Tennessee Supreme Court was entered on April 16, 1990. Petitioner filed a Petition for a Writ of Certiorari to the Supreme Court of the State of Tennessee on September 12, 1990. The Petition for Writ of Certiorari was granted February 15, 1991. The Court subsequently entered an amended order on February 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

United States Constitution:

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

United States Constitution:

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Pervis Payne, a twenty year old mentally handicapped black man with no previous criminal record, was convicted of the first degree murder of Charisse A. Christopher, a twenty-eight year old white woman, and her two year old daughter, Lacie Jo Christopher. He was also convicted of assaulting Charisse Christopher's three year old son, Nicholas, with intent to commit murder in the first degree. Following a separate penalty trial, Payne was sentenced by the jury to die.

During the guilt phase, the prosecution presented evidence from which the jury could conclude that Payne had committed the attacks while under the influence of cocaine.

Payne denied committing the crimes. Testifying on his own behalf, Payne admitted being in the victim's apart-

ment shortly before the offense, but denied that he had committed the crimes (T. 1220-29). Payne testified that, on his way to his girlfriend's apartment, located on the same floor as that of the victims, he passed an unidentified black man descending the steps from the victims' apartment (T. 1215-16). Payne further testified that he heard a baby crying inside. (T. 1218). He said that, when he entered the apartment, he found Charisse Christopher with a knife protruding from her throat (T. 1220).

The only proof offered by the prosecution during the sentencing phase consisted of victim impact information of precisely the type that was condemned in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), and a color videotape of the crime scene that had not been introduced into evidence during the guilt phase of the trial.

Mary Zvolanek, the mother and grandmother of the victims, responding to a question designed to elicit precisely the type of testimony condemned by *Booth*, testified that the deaths of Nicholas' mother and sister had had a devastating effect upon the young boy:

Q. Ms. Zvolanek, how has the murder of Nicholas's mother and his sister affected him?

A. He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie. (J.A. 3).

Ms. Zvolanek's emotional testimony, of course, also revealed her own grief.

After next showing the videotape, the State rested. Payne then offered, in mitigation, evidence that he had no prior record; that he had been a hard and diligent worker; and that he regularly attended the church where his father was the minister. (T. 1500, 1568-70). A clin-

ical psychologist testified about Payne's low I.Q. scores, which he considered significant (T. 1520, 1528). He refrained from describing Payne as retarded, pointing out that that term is "not commonly used any more" (T. 1520). He instead characterized Payne as "mentally handicapped" (T. 1531). He also said that Payne was one of the most polite prisoners that he had ever interviewed (T. 1530).

The prosecution completed its initial closing argument with the dramatic insistence that the jury should sentence Payne to death in order to satisfy an anticipated desire by Nicholas for Payne's execution:

There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There obviously is nothing you can do for Charisse or Lacie Jo. But there is something you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer. (J.A. 12).

In its rebuttal to Payne's closing argument, the prosecution described the impact on Nicholas of the loss of his mother and sister:

. . . And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby. (J.A. 14).

* * * *

Mr. Garts wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who loved Charisse Christopher, her mother and daddy who love her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever. (J.A. 15-16).

The prosecutor subsequently alluded to the "exemplary lives" led by the deceased victims:

Mr. Garts says but [sic] Pervis Payne has lived an exemplary life for twenty years. Well, what about Charisse, for twenty-eight years? What about Lacie Jo, for two years? They lived exemplary lives. (J.A. 17).

Having based its arguments almost entirely on the victim impact information and the videotape, the prosecution concluded with the following remarks:

Ladies and gentlemen of the jury, this is the last thing I am going to say to you. But I want you to think about this when you go back into your jury room. We have heard a lot about Charisse Christopher, Lacie Jo and Nicholas, and how they were as they appeared before Pervis Payne came into their lives. And this is what he did to them. (J.A. 17).

The prosecutor then approached a large diagram of Nicholas Christopher's body and stabbed a hole through it with the butcher knife that was found at the crime scene. See *Tennessee v. Payne*, 791 S.W.2d 10, 20 (1990) (J.A. 25, 45). The Tennessee Supreme Court, in its opinion affirming Payne's conviction and sentence, condemned this conduct as "improper argument, an improper, un-

professional act and an improper use of exhibits." *Id.* It refused, however, to order a new sentencing trial.

In returning its verdict, the jury reported on the form provided to it: "We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstances so listed above" (J.A. 23).¹

The Tennessee Supreme Court ruled that Ms. Zvolanek's testimony about the effect that Charisse's and Lacie Jo's deaths had had upon Nicholas, while "technically irrelevant," . . . "did not create a constitutionally unacceptable risk or any arbitrary imposition of the death penalty," and thus was harmless error. *Id.* at 17-18. (J.A. 40). The court further ruled that the victim impact arguments made by the State during the sentencing phase were relevant to show Payne's "personal responsibility and moral guilt." *Id.* at 18-19. (J.A. 42).

This case is now before the Court pursuant to the Amended Order of February 19, 1991 granting Payne's petition for certiorari.

¹ The statute under which Payne was tried, Tenn. Code Ann. § 39-2-203(g) (1987 Supp.), and the instruction given to the jury pursuant to that statute (J.A. 21, 22), specifically required Payne, in order to save his life, to convince the jury that the mitigating evidence outweighed the aggravating circumstances. This statute was subsequently repealed. The new statute, Tenn. Code Ann. § 38-13-204(g)(2)(B), requires that the jury "unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances." Unlike Payne, a defendant tried under this new statute is no longer required, in order to avoid death, to prove that the mitigating evidence outweighs the aggravating circumstances. Tenn. Code Ann. § 39-13-204(g)(2)(B) (1990 Supp.).

SUMMARY OF ARGUMENT

In violation of the Court's decisions in *Booth* and *Gathers*, the State made its case for executing Payne by emphasizing the suffering of the survivors, insisting that the jury impose the death penalty because of the anticipated desire of Nicholas for Payne's execution, and asserting the exemplary lives of the deceased victims. The record in this case demonstrates, without question, that the State's use of this information was part of an overall strategy to gain a decision based on emotion, rather than reasoned judgment. Because Payne's rights under the Eighth and Fourteenth Amendments were violated, his sentence must be vacated unless the Court overrules *Booth* and *Gathers*.

On principles of stare decisis, the Court should not overrule *Booth* and *Gathers*. Deference to stare decisis promotes stability and public confidence in the judiciary and in the authority of constitutional decisions. There has been no time for the Court's decisions in *Booth* and *Gathers* to be tested by experience.

Apart from the absence of exceptional circumstances calling for departure from stare decisis, *Booth* and *Gathers* should not be overruled in any event. They are constitutionally sound decisions that preserve fundamental Eighth Amendment safeguards and follow logically from the Court's prior decisions.

Unforeseeable victim impact information says nothing about a defendant's state of mind, character, or propensity for future dangerousness. It is, therefore, irrelevant to the capital sentencing determination. The Eighth Amendment prohibits the use of such information in capital sentencing determinations because its consideration creates the risk that death will be imposed out of whim, passion, prejudice or mistake.

An examination of the consequences of overruling *Booth* and *Gathers* further demonstrates that these decisions are necessary to preserve the Eighth Amendment's safeguards. The use of unforeseeable victim impact information will convert the sentencer's guided discretion to determine whether the offender's depravity warrants death into an uncontrollable and open-ended invitation to decide whether a particular victim's worth merits executing the offender. At best, the imposition of the death penalty will turn on the victim's perceived character and value to others, with the sentencer in each case becoming society's agent for determining the relative merits of the victims. At worst, it will become a mechanism for implementing social prejudice.

If *Booth* and *Gathers* are overruled, the inevitable tendency in capital sentencing trials will be to push the defendant's state of mind, character, and propensity for future dangerousness into the background, as the focus shifts to the victim's character and worth. This, in turn, will deter the sentencer from making a reasoned moral response to the offender's background, character, and crime.

Though unforeseeable victim impact information is not relevant to prove an offender's state of mind, character, or propensity for future dangerousness, it has been stated that a state may nonetheless use such information in a capital sentencing determination, because (1) by considering unforeseeable victim impact information, the sentencer implements society's legitimate interest in retribution; (2) the law, in other contexts, makes punishment dependent upon the unforeseeable consequences of the offense; and (3) unforeseeable victim impact information is needed to counter mitigating evidence offered by the defendant. These justifications for allowing a state to use such information should be rejected.

The use of unforeseeable victim impact information not only fails to promote, but actually undermines, the peno-

logical objective of retribution. When a society invokes retribution to authorize the death penalty, it recognizes that life is so precious that its aggravated taking permits the execution of the responsible offender. Retribution, when invoked in this fashion, recognizes the preciousness of every human life. When, however, retribution is used to make comparative evaluations of the lives of individual victims, then, of necessity, it no longer affirms the preciousness of every life, and it no longer comports with the dignity of men.

That the law, in other contexts, allows punishment to depend upon the unforeseeable consequences of the offender's conduct does not justify the use of such information in capital sentencing trials. Legislatures, in making distinctions among punishments for different types of offenses, often make presumptions that the harm caused by the offense is generally indicative of the actor's intent. In those instances in which legislatures make punishment distinctions based solely on the harm caused by the actor's conduct, they do so on the basis of the harm to society in general, and not on the basis of the harm suffered by individuals in particular.

The use of unforeseeable victim impact information in non-capital cases may often be justified by the information's relevance to restitution. Restitution, of course, plays no role in the determination of whether an offender should live or die. Furthermore, the use of irrelevant information to enhance punishment in non-capital cases very rarely, if ever, violates the Eighth Amendment.

The use of unforeseeable victim impact information in a capital sentencing trial cannot be justified on the grounds that it is relevant to rebut mitigating evidence offered by the defendant. There is no symmetry between the defendant's offer of mitigating circumstances and the prosecution's use of the unforeseeable consequences of the offense. The prosecution may, of course, counter the de-

fendant's mitigating evidence through the cross-examination of defense witnesses, the introduction of its own proof directed toward relevant factors, and the use of appropriate arguments.

Finally, the Tennessee Supreme Court erroneously concluded that the State's use of unforeseeable victim impact information constituted harmless error. Apart from the crimes themselves, which, of course, were brutal and shocking, there was no evidence that supported the imposition of death other than the *Booth*-condemned victim impact information.

At the time of these killings, Payne was a twenty year old mentally handicapped laborer, with no prior record. The State introduced no evidence of any disciplinary problems or academic misconduct. Nor did the State seek to show any clinical evaluation or otherwise attempt to demonstrate any propensity for future dangerousness. The State was thus forced to make its case for execution through the use of *Booth*-violative evidence and arguments and through theatrics purposefully calculated to induce an emotional reaction, rather than a reasoned, moral response.

Payne was required to convince the jury that his mitigating evidence outweighed the aggravating circumstances. The State's heavy reliance on the *Booth*-condemned information made Payne's burden especially onerous. The erroneous use of this information was not harmless beyond a reasonable doubt.

ARGUMENT

I. THE VICTIM IMPACT INFORMATION USED IN THIS CASE IS OF THE TYPE CONDEMNED IN *BOOTH* AND *GATHERS*.

While Justice Powell purported to classify victim impact information into two types, *Booth* at 502, he actually identified three types of information: (1) the personal characteristics of the victims; (2) the emotional impact of the crimes on surviving family members; and (3) the family members' opinions and characterizations of the crimes and of the defendant. *Id.* All three were present here. In addition to referring to the "exemplary lives" led by the deceased victims (J.A. 17), the State emphasized the emotional effect that the crimes have had on the survivors (J.A. 3, 12, 14, 15-16) and dramatically invoked the anticipated desire of Nicholas for Payne's execution as a reason for imposing the death penalty (J.A. 12).

Other than the police officer who authenticated the videotape, the only witness called by the prosecution was Mary Zvolanek, the mother and grandmother of the victims. Her emotional testimony that Nicholas "cries for his mother" and "misses my Lacie" fits precisely within the second type of information condemned in *Booth*. This live testimony, while certainly not as lengthy as the written statement in *Booth*, was every bit as devastating. That the prosecution appreciated the tendency of this testimony to arouse the passions of the jury is underscored by the heavy emphasis it placed on Ms. Zvolanek's testimony both during the opening statement of the sentencing trial, when the prosecution promised the jury it would hear Ms. Zvolanek describe the impact on Nicholas (J.A. 5), and during its closing arguments (J.A. 12, 15-16). That the formal presentation of this testimony was part of an overall strategy by the prosecution to induce an emotional reaction from the jury, rather than a reasoned moral response to the evidence, is further borne out by

the prosecution's introduction of the gruesome color videotape (T. 1505-07) during the sentencing phase² and its improper stabbing of the exhibit at the close of the rebuttal argument. *See Tennessee v. Payne*, 791 S.W.2d at 20 (J.A. 45).

It is, of course, foreseeable to a murderer that, when he knowingly leaves a surviving small child, the child will miss and long for his dead parent. This knowledge is relevant to show moral blameworthiness. As Justice Powell wrote, "a defendant's degree of knowledge of the probable consequences of his actions may increase his

² The tape showed the crime scene, including the bodies of the two dead victims. Charisse's hands and face revealed the effects of *rigor mortis*, and the tape focused on these particular features for several seconds at a time, sometimes with "close-ups." The prosecution's dramatic reference to the tape in closing argument sought to connect the victim's features, as depicted in the film, with the "depravity" of the conduct:

Now the first two minutes of the videotape wasn't just shown because it's in color and looks a whole lot more gory. It's because it shows more detail and more accurately what we're talking about in the first stage of the trial. And while, perhaps I couldn't refer to it in voir dire, you remember when I asked you in voir dire could you listen to that kind of proof, that you were going to hear some rather graphic evidence of wounds. Well, that's what I was talking about.

You see, because that's not something I want to spring on somebody without warning them on the front end, even though it was a week ago. Because it shows very graphically how atrocious this crime was, how cruel it was, and how much depravity it showed. Some of the details especially in that picture—in that videotape, you can't see as well as [sic] in the black and white picture. For instance, Charisse's right hand all gnarled up in agony. And Lacie Jo's hand and Lacie Jo's eyes and the expression on her face some people refer to as the thousand yard stare because it's just sort of not focused (J.A. 7-8).

No foundation had been laid, of course, for the argument that Charisse's "gnarled" hand reflected her "agony" at death or that the expression on the child's face was relevant to show the nature of the killing.

moral culpability in a constitutionally significant manner." *Booth v. Maryland*, 482 U.S. at 505. In the case at bar, therefore, the prosecution could have argued to the jury that the perpetrator likely knew that, if by chance a child survived the attack, he or she would long for his or her mother or sibling.

The fact that the prosecution could have made this argument does not justify its formal presentation of Ms. Zvolanek's testimony in blatant violation of *Booth*. Her live emotional testimony that Nicholas did in fact cry for his mother, that he repeatedly asked for "my Lacie", and that he asked his grandmother if she "also missed Lacie" is markedly different from the prosecutor's merely drawing a general inference during an argument. It is evidence designed to evoke a response based on what actually happened to Nicholas, rather than on what the perpetrator might have foreseen as the effect of his attack. Absent this evidence, the jury's focus would be properly limited to an assessment of the probable consequences of the crimes from the same vantage point as the perpetrator. "[T]he formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Booth v. Maryland*, 482 U.S. at 508.

Furthermore, the emotional trauma to the grandparents, revealed through Ms. Zvolanek's testimony and invoked by the prosecution in both its initial closing (J.A. 12) and rebuttal (J.A. 15-16) arguments, was offered solely to show the effect of the crimes on the survivors. It certainly had no bearing on the defendant's state of mind or character.

Equally, if not more, prejudicial was the prosecution's dramatic conclusion to its initial closing argument (J.A. 12). The prosecution insisted that the jury should impose the death penalty because nothing else will satisfy

Nicholas' wishes as he matures and comes to appreciate what has happened.

A survivor's opinion on whether the offender should be executed was condemned not only by the majority in *Booth*, *id.* at 508, but also, perhaps, by the dissent, *id.* at 518-19 (White, J., dissenting) (pointing out that, even if inappropriate to allow victim's family to express such opinions, this is no reason to declare admission of victim impact information *per se* unconstitutional). The prosecution's argument in this case goes even beyond a survivor's expression of the opinion that the defendant should be executed. The prosecution not only took it upon itself to assure the jury that Nicholas would want Payne executed, but also indicated that Nicholas would be greatly disappointed if the jury reached a different conclusion. There is, of course, no support in the record for the prosecution's assumption. More significantly, even if it is assumed that Nicholas will want Payne executed, asking a jury to impose death for that reason is condemned by the majority opinion in *Booth*, *id.* at 508-09, and, as just noted, perhaps by the dissenting opinion as well. *Id.* at 518-19.

The prosecution's appeal took from the jury the awesome decision making responsibility that it, and it alone, is supposed to exercise. The prosecution's insistence that the jury impose death not because the evidence mandated that decision, but because of the anticipated desire of Nicholas for Payne's execution, was a form of psychological intimidation expressly calculated to make the jurors feel that they would be letting Nicholas down if they did not impose death. This insistence was, therefore, "clearly inconsistent with the reasoned decision-making [the Court] require[s] in capital cases." *Id.* at 508-09.

The use of opinion victim impact information makes a capital sentence dependent on how eloquently the victim's survivors can plead for the offender's death. The

prosecution here undoubtedly chose to make this dramatic appeal because it knew that there could be no more eloquent advocate of death than a three year old child who has himself been attacked by the defendant. The fact that the appeal was made through the voice of the State's representative only served to give it added weight.

It is no coincidence that both this dramatic appeal and the subsequent stabbing of the exhibit occurred at the conclusions of the prosecution's arguments. The prosecution's strategy was to gain a decision based on emotion, rather than one based on a reasoned, moral judgment.

The conclusion is inescapable that the victim impact information used in this case is of the type condemned in *Booth* and *Gathers*. Payne's sentence must, therefore, be reversed, unless the Court now overrules *Booth* and *Gathers*.³

II. ON PRINCIPLES OF STARE DECISIS, THE COURT SHOULD DECLINE TO OVERRULE *BOOTH* AND *GATHERS*.

Four years ago, in a 5-4 decision, the Court decided *Booth v. Maryland*, 482 U.S. 496 (1987), holding that the Eighth Amendment prohibits a state from using unforeseeable victim impact information in a capital sentencing proceeding. Less than two years ago, in *South Carolina v. Gathers*, 490 U.S. 805 (1989), the Court refused to overrule *Booth* and made it clear that *Booth's* prohibition applied even when the only victim impact information used by the prosecution consists of information designed to show the character of the victim. Since

³ The Court would, in fact, have to overrule *Booth* in its entirety in order to affirm Payne's death sentence. Because each of the three types of victim impact information is present here, Payne's sentence must be vacated even if the Court decides to leave intact only that part of *Booth* that condemns the use of opinions on whether the offender should be executed. See *Booth v. Maryland*, 482 U.S. at 508-09. This point is more fully addressed *supra* at pages 28-29.

the decision in *Gathers*, nothing has occurred that diminishes the authority or reasoning of either *Booth* or *Gathers*.

"The rule of law depends in large part on adherence to the doctrine of *stare decisis*." *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 478 (1987) (opinion of Justice Powell, for himself, Chief Justice Rehnquist, Justice White, and Justice O'Connor). As Justice Cardozo wrote, "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, *The Nature of the Judicial Process* 149 (1921), quoted in *Runyon v. McCrary*, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring).

Conscientious adherence to the doctrine is often signified by an individual Justice's willingness to suppress his or her personal preferences in deference to a commitment to the rule of law. See, e.g., *Orozco v. Texas*, 394 U.S. 324, 327-28 (1969) (Harlan, J., concurring). While the doctrine is of greatest force when the Court construes legislation, see *Smith v. Allwright*, 321 U.S. 649, 665 (1944), it is also applicable to matters of constitutional interpretation. As the Court has recently observed, "[a]lthough adherence to precedent is not rigidly required in constitutional cases, *any* departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (emphasis added).

Deference to precedent promotes stability and public confidence in the judiciary and in the authority of constitutional decisions. The public correctly relies on its perception that this is a nation governed by law rather than the views of the individual Justices. While certainly a Justice must vote to overrule a decision that in his or her view conflicts with the Constitution, see *South Carolina v. Gathers*, 490 U.S. at 824-25 (Scalia, J., dis-

senting), the interests in stability and public confidence require that there be a high and perhaps atypical degree of certainty in the Justice's conviction before he or she votes to abandon a previous decision.

The doctrine of *stare decisis* recognizes the danger that, if a new generation of Justices "corrects" the errors of its predecessors, the Court might move farther and farther away from the fundamental principles that allow it to implement the rule of law rather than the "mere exercise of judicial will, with arbitrary and unpredictable results." *Thornburg v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 786-87 (1986) (White, J., dissenting); *Appeal of Portsmouth Savings Bank Corporators*, 525 A.2d 671, 701 (N.H. 1987) (Souter, J., dissenting). To be meaningful, therefore, the doctrine should be followed by an individual Justice even when it requires adopting a position that is contrary to the one he or she would have otherwise adopted on an open question.

The issues addressed in *Booth* and *Gathers* deal with matters that can, and should, be evaluated in the light of experience. Admittedly, experience with the consequences of some decisions sheds little light upon their wisdom. Cf. *Thornburg v. American College of Obstetricians & Gynecologists*, 476 U.S. at 786-88 (White, J., dissenting). *Booth* and *Gathers*, however, are not such cases. A few years' experience with these decisions should provide the bar and this Court with a realistic assessment of the consequences of prohibiting the use of unforeseeable victim impact information. To date, however, there has been no time for these decisions to be "duly tested by experience." See B. Cardozo, *supra*. To overrule these decisions at this time would serve no purpose but to block the opportunity for enlightenment.

It has been suggested that a precedent should be overruled when experience demonstrates that it has spawned an "unworkable scheme" that has resulted in "a major

distortion in the Court's constitutional jurisprudence." *Thornburg v. American College of Obstetricians & Gynecologists*, 476 U.S. at 814 (O'Connor, J., dissenting). Such a distortion might occur, for example, when the initial decision leads to subsequent decisions that contravene settled principles of justiciability and procedural fairness. *Id.* at 815. There has, however, been no claim that *Booth* and *Gathers* have created such distortions. These decisions involve the limited application of constitutional principles to a particular segment of criminal sentencing. This is not to suggest, of course, that *Booth* and *Gathers* are not very important decisions, but only to point out that, in terms of whether to depart from stare decisis, they are distinguishable from cases having a wider impact.

Stare decisis is an integral part of constitutional jurisprudence. It is a doctrine from which the Court should depart only when exceptional justifications exist. We respectfully submit that those justifications do not exist here.

III. THE COURT'S RULINGS IN *BOOTH* AND *GATHERS* ARE NECESSARY TO PRESERVE FUNDAMENTAL EIGHTH AMENDMENT SAFEGUARDS.

This section is divided into two sub-sections. We first explain that *Booth* and *Gathers* follow logically from the Court's earlier decisions. In the second sub-section, we examine the consequences of overruling *Booth* and *Gathers* and explain that these adverse consequences illustrate why these decisions are necessary to preserve the Eighth Amendment's safeguards.

A. *Booth* and *Gathers* follow logically from the Court's earlier decisions.

The Eighth Amendment, like all constitutional provisions, must be construed in a way that implements the principles that it embraces. Though there is a difference

of opinion about the framers' original intent,⁴ it is now settled that the Eighth Amendment protects American citizens from a punishment that is disproportionate to the crime of which he is convicted. *Weems v. United States*, 217 U.S. 349 (1910); *Enmund v. Florida*, 458 U.S. 782, 788 (1982). It is also settled that the Eighth Amendment requires an individualized sentencing determination in a capital case, because, otherwise, there would be a constitutionally unacceptable risk that death will be imposed in spite of factors that may call for a less severe punishment. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

In this constitutionally mandated individualized sentencing determination, the sentencer must consider those, and only those, factors that bear on whether the punishment is appropriate for the offender's blameworthiness. A process that either withholds from the sentencer's consideration relevant evidence, see, e.g., *Eddings v. Oklahoma*, 455 U.S. 104 (1982), or allows the sentencer to consider factors that are prejudicially irrelevant to that determination, see, e.g., *Caldwell v. Mississippi*, 472 U.S. 320 (1985), necessarily runs afoul of the Eighth Amendment.

The Eighth Amendment's individualized sentencing requirement is thus concerned with the "process" by which sentences are determined in capital cases. *Eddings*

⁴ Compare the dissent of Justice White, with whom Justice Holmes joined, in *Weems v. United States*, 217 U.S. 349, 393-95 (1910) (finding no historical support for the conclusion that the framers intended a constitutional prohibition against disproportionate punishments) with Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United Excessive Punishment Doctrine*, 24 Buffalo L. Rev. 783, 806-30 (1975) (arguing that Jefferson, Madison, and others responsible not only for the drafting of the Bill of Rights but prior state legislation as well were influenced by Cesare Beccaria's 1764 treatise, *On Crimes and Punishments*, in which he advocated proportional punishments along with other criminal law reforms).

v. Oklahoma, 455 U.S. at 118 (O'Connor, J., concurring). Insufficiently guided discretion produces the constitutionally unacceptable risk that punishment might be “imposed out of whim, passion, prejudice or mistake,” *id.*, or that the sentence will not “reflect a reasoned moral response to the defendant’s background, character and crime rather than mere sympathy or emotion.” *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (emphasis original).

Booth and *Gathers* follow logically from these settled principles. Unforeseeable victim impact information is irrelevant to the sentencing determination. Such information tells the sentencer absolutely nothing about the offender’s state of mind, character, or propensity for future dangerousness. It is, therefore, “wholly unrelated to the blameworthiness” of the defendant. *Booth v. Maryland*, 482 U.S. at 504.

Allowing the sentencer to consider such information “could result in imposing the death penalty because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.” *Id.* at 505. This, in turn, could “divert the jury’s attention away from the defendant’s background and record, and the circumstances of the crime.” *Id.*

Booth also recognizes that the use of unforeseeable victim impact information might create arbitrary distinctions between those cases in which death is, and is not, imposed. *Id.* at 505-06. Such arbitrary distinctions have, of course, been a principal concern of the Court since its decision in *Furman v. Georgia*, 408 U.S. 238 (1972). See *id.* at 312-13 (White, J., concurring).

After pointing out that in some cases the victim may “not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe,” *Booth* at 505, the Court said that “the fact that the imposition of the death sentence may turn on such distinctions illustrates the

danger of allowing juries to consider this information.” *Id.* Similarly, the Court stated that there is no justification for allowing a capital sentencing “decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character.” *Id.* at 506. Citing the Court’s earlier decision in *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (opinion of Stewart, J.), Justice Powell wrote that information concerning the worth of the victim “does not provide a ‘principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not.’” *Id.* The use of such information, in other words, does not provide a basis of distinction that serves any legitimate “end of punishment in the criminal justice system.” Cf. *Furman v. Georgia*, 408 U.S. at 311 (White, J., concurring).

B. A more detailed examination of the consequences of overruling *Booth* and *Gathers* further demonstrates that these decisions are necessary to preserve the Eighth Amendment’s safeguards against disproportionate punishment and arbitrary classifications.

Unforeseeable victim impact information, as previously noted, will provide no assistance whatsoever to the assessment of the offender’s state of mind, character, or propensity for future dangerousness. A murder is no less heinous, and the offender no less deserving of punishment, simply because the victim happens to be a derelict or a hermit who dies without survivors rather than, say, a beloved parent.

That a victim led an exemplary life, or is missed by her survivors, is no more relevant to the defendant’s blameworthiness than evidence of the victim’s moral shortcomings. Let us say, for example, that a priest is brutally murdered by a man who, while in the process of robbing the parish safe, is surprised by the priest. Let us further postulate that the defendant’s attorney, in the

course of his investigation of the case, turns up two young children who will testify that the priest, on several occasions, persuaded them to engage in sexual acts with him.

Ignoring for the moment the lack of wisdom attendant to such a tactic, the defense's attempted introduction of the evidence of the victim's transgressions should be irrelevant, since those past transgressions do not aid the assessment of the defendant's moral culpability.⁵ Yet, if *Booth* and *Gathers* are overruled, unfavorable, as well as favorable, information about the victim could be used during the sentencing trial, with the concomitant increased likelihood that the sentencer will be diverted from its evaluation of the offender's blameworthiness.

In addition to providing no assistance to the evaluation of the offender's state of mind, character, or propensity for future dangerousness, the use of unforeseeable victim impact information will convert the sentencer's guided discretion to determine whether the offender's depravity warrants death into an uncontrollable and open-ended invitation to decide whether a particular victim's value to society and/or his survivors merits executing the offender. This, in turn, could well result in the imposition of the death penalty on the basis of the sentencer's assessment of such constitutionally impermissible factors as the victim's race, religion, gender, and economic or social status.⁶

⁵ See *State v. Gaskins*, 284 S.C. 105, 128, 326 S.E.2d 132, 145, cert. denied, 471 U.S. 1120 (1985) (no error in excluding confession of victim, a death-sentenced murderer, proffered by defense since victim's status "did not entitle [defendant] to kill him"); *State v. Oliver*, No. 49613 (page 8) (Ohio Ct. App. Oct. 17, 1985) (LEXIS, states library, Ohio file) (state's evidence that the victim was a nice and intelligent person and defense evidence of victim's homosexual acts both held inadmissible); *Henderson v. State*, 234 Ga. 827, 828, 218 S.E.2d 612, 614 (1975) (in general, evidence of deceased's character is inadmissible in a murder trial).

⁶ Sentencing determinations may not be based on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example, the race, religion, or political

At best, the imposition of the death penalty would turn on the victim's perceived character and value to others, with the sentencer in each case becoming society's agent for determining the relative merits of the victims. At worst, the death penalty would become a mechanism for implementing social prejudice.

The consequences of overruling *Booth* and *Gathers* will be grim indeed. The tendency will be to push the defendant's state of mind, character, and propensity for future dangerousness into the background, as the focus shifts to the victim's character and worth. The prosecution will present the victim in a manner that appeals to the parochial perspective of the jury, and the defense will often find irresistible the opportunity to attack the victim's character. As this case vividly illustrates, the use of *Booth*-condemned information can be an essential part of

affiliation of the defendant." *Zant v. Stephens*, 462 U.S. 862, 885 (1983); *Booth v. Maryland*, 482 U.S. at 517 (White, J., dissenting) ("It is no doubt true that the State may not encourage the sentencer to rely on a factor such as the victim's race in determining whether the death penalty is appropriate").

The reality, unfortunately, is that already there is disturbing evidence that the chance that the death penalty will be imposed is significantly greater in cases in which the victims are white than in those in which the victims are black. See, e.g., the "Baldus study," the findings of which, concededly, were neither accepted nor rejected by the Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987). If prosecutorial discretion to seek the death penalty is in fact influenced by the race of the victim, see *id.* at 286-87 (discussing "Baldus study"), then this tendency is likely to be exacerbated if the prosecutor believes that the strength of his case depends upon his ability to marshall effective evidence of the victim's worth or standing in the community.

In *Turner v. Murray*, 476 U.S. 28, 36 (1986), the Court held that the risk of racial prejudice infecting the sentencing decision in a case involving a white victim and black defendant was sufficient to require voir dire examination of jurors about their racial attitudes. This recognized risk of racial prejudice could, of course, also surface when the sentencer is expressly urged to consider the status and worth of the victim.

the prosecution's strategy to gain a death sentence based on emotion rather than on "a reasoned moral response to the defendant's background, character, and crime. . . ." *California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (emphasis original). Furthermore, in its most extreme form, the capital sentencing trial will be a forum for pandering, be it subtle or flagrant, to the most insidious social prejudices.

IV. THE JUSTIFICATIONS ADVANCED FOR OVER-RULING *BOOTH* AND *GATHERS* SHOULD BE REJECTED.

It is, we believe, self-evident that unforeseeable victim impact information is not relevant to show an offender's state of mind, character, or propensity for future dangerousness. Those who dissented in *Booth* and *Gathers* have nevertheless indicated that the use of such information may be constitutionally permissible because:

(1) The unforeseeable consequences of an offense comprise part of the offender's "blameworthiness," *Booth v. Maryland*, 482 U.S. at 515-16 (White, J., dissenting); *id.* at 519 (Scalia, J., dissenting); *South Carolina v. Gathers*, 490 U.S. at 817-18 (O'Connor, J., dissenting); and, by considering unforeseeable victim impact information in this fashion, the sentencer implements society's legitimate interest in retribution, *Booth v. Maryland*, 482 U.S. at 515 (White, J., dissenting); *South Carolina v. Gathers*, 490 U.S. at 819-20 (O'Connor, J., dissenting);

(2) The law, in other contexts, makes punishment dependent upon the unforeseeable consequences of the offense, *Booth v. Maryland*, 482 U.S. at 516-17 (White, J., dissenting); *id.* at 519-20 (Scalia, J., dissenting); *South Carolina v. Gathers*, 490 U.S. at 819 (O'Connor, J., dissenting); and

(3) Such information is needed to counter mitigating evidence offered by the defendant, *Booth v. Maryland*, 482 U.S. at 518 (White, J., dissenting); *id.* at 520

(Scalia, J., dissenting); *South Carolina v. Gathers*, 490 U.S. at 820-21 (O'Connor, J., dissenting).

In the next three subsections, we explain that these proffered justifications for permitting a state to use unforeseeable victim impact information should be rejected.

A. Victim impact information of the type challenged here not only fails to promote, but actually undermines, the penological objective of retribution.

Retribution is a valid penological basis for authorizing the imposition of the death penalty in certain types of homicide. *South Carolina v. Gathers*, 490 U.S. at 818 (O'Connor, J., dissenting). "'[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.'" *Booth v. Maryland*, 482 U.S. at 515 (White, J., dissenting), quoting *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.).

A legislature invokes retribution by declaring that the execution of the offender is a permissible, though not mandatory, response to the commission of certain classes of offenses (i.e., homicides with one or more aggravating factors present). In any given case, the sentencer, clothed with the legislative authorization, implements retribution by considering the defendant's state of mind, character, and propensity for future dangerousness and then deciding the appropriate punishment. Consideration of the victim's status, his survivors' grief, or his survivors' opinions on whether the defendant should be executed is in no way essential to the sentencer's implementation of retribution.

Though retribution can be implemented without the sentencer's having to consider *Booth*-condemned victim impact information, the question that the Court must

decide is whether a state *may* allow the use of such information in a capital sentencing trial. As explained in section C, immediately *supra*, *Booth*, relying on earlier Eighth Amendment decisions, answers this question in the negative. Stated succinctly, the use of such information prevents the sentencer from making the requisite reasoned moral judgment, *Booth* at 505, and creates an arbitrary classification that affords no principled basis for distinguishing the cases in which the death penalty is, and is not, imposed. *Id.* at 505-06. Retribution thus cannot serve as a license for making distinctions based on the perceived worth of victims. As Justice Powell explained: "We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions." *Booth v. Maryland*, 482 U.S. at 506 n.8 (citation omitted).⁷

Justice Powell's reasoning is essential to preserving the principle, announced in previous decisions, that retribution is consistent with the Eighth Amendment's respect for the "dignity of men," see *Gregg v. Georgia*, 428 U.S. at 183 (opinion of Stewart, Powell, and Stevens, J.J.); *Thompson v. Oklahoma*, 487 U.S. 815, 836 (1988). His analysis recognizes retribution's affirmation of the preciousness of life, without simultaneously allowing retribution to be used to exalt some lives over others.

Though punishing offenders by executing them ordinarily is inconsistent with the Eighth Amendment's respect for the "dignity of men," there are limited instances when society's interest in retribution allows the death penalty. *Gregg v. Georgia*, 428 U.S. at 183 (Stewart,

⁷ In those instances in which the governmental interest justifies special protection for certain classes of persons, legislators have acted explicitly. E.g., 18 U.S.C. § 351 (protecting the lives of members of Congress, Cabinet members, and Supreme Court Justices).

Powell and Stevens, J.J.). In these limited instances, invoking retribution to execute the offender is compatible with the dignity of men. *Id.*; *Thompson v. Oklahoma*, 487 U.S. at 836. What permits retribution to be invoked in this fashion is society's recognition of the preciousness of human life—that is, a recognition that each life is so precious that its aggravated taking permits the execution of the responsible offender. It is this affirmation of the preciousness of all human life that makes retribution-based execution compatible with the dignity of men. If, however, retribution becomes a device for making comparative evaluations of the lives of individual victims, then, of necessity, it no longer affirms the preciousness of all life, and it no longer comports with the dignity of men.

Prohibiting the use of unforeseeable victim impact information in no way prevents the sentencer from serving as the "conscience of the community" or from expressing society's "moral outrage". That function is still performed when the sentencer decides whether death is warranted by evidence of the defendant's state of mind, character, and propensity for future dangerousness. By focusing on whether the offender deserves to die for taking another life, rather than on whether the offender's death is satisfactory compensation for the particular victim's life, the sentencer serves retribution's objective of affirming the preciousness of all life.

The essential lesson of *Booth* and *Gathers* is that the brutal, cold blooded murder of a lonely prostitute is every bit as heinous as the similar killing of a hard working, loving mother. That the Eighth Amendment must accommodate this view of humanity is hardly a bad thing. It will ensure that prosecutors, in their efforts to vindicate society's valid interest in retribution, will appeal to the sentencer's reason by focusing on what the defendant did, why he did it, the manner in which he did it, and the kind of person he is. The prosecutor will be called

upon to assume that the sentencer will regard all life as precious and will believe that the less exalted members of our society are just as entitled to protection and justice as are others.

That the holdings of *Booth* and *Gathers* do not impede prosecutors from vindicating society's interest in retribution warrants further emphasis. The prosecution will always be entitled to introduce during the guilt phase evidence of the victim's characteristics relevant to the issues raised in that proceeding. Furthermore, during the sentencing phase, the prosecution will be permitted to prove the defendant's knowledge of both the victim's characteristics and his survivors and to ask the sentencer to make whatever inferences the record will legitimately support concerning the defendant's awareness of the probable consequences of his offense. *Booth v. Maryland*, 482 U.S. at 505.

While we are convinced of the logic and correctness of our position, it would nonetheless amount to folly on our part if we failed to recognize that some members of the Court may not accept our reasoning. We hasten to observe, therefore, that, even if one assumes *arguendo* that retribution may be invoked to justify the sentencer's consideration of unforeseeable victim impact information, there is still no valid basis for allowing the sentencer to consider the third category of information condemned in *Booth*—namely, opinions and characterizations of the defendant and of the crime.

As this case graphically illustrates, invoking a survivor's demand for the defendant's execution takes from the sentencer the responsibility it, and it alone, must exercise and diverts the sentencer from making a decision that "reflects a reasoned moral response to the defendant's background, character and crime rather than mere sympathy or emotion." *California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (emphasis original). The fact that the prosecution concluded its initial

closing argument with this dramatic appeal (J.A. 12) and its rebuttal by stabbing the exhibit, see *Tennessee v. Payne*, 791 S.W.2d at 20 (J.A. 45), was hardly coincidental. The prosecution plainly wanted from the jury an emotional reaction, not a reasoned moral response. Because of the prosecution's psychologically intimidating insistence that the jury not let Nicholas down (J.A. 12), Payne's sentence must be set aside even if the Court leaves intact only that part of *Booth* that condemns the use of opinions and characterizations.

B. That the law, in other contexts, allows punishment to depend upon the unforeseeable consequences of the offender's conduct does not justify the use of unforeseeable victim impact information in capital sentencing trials.

1. Legislatures, in making distinctions among punishments for different types of offenses, often make presumptions that the harm caused by the offense generally is indicative of the actor's intent. In those instances in which legislatures make punishment distinctions based solely on the harm caused by actor's conduct, they do so on the basis of the harm to society in general, and not on the basis of the harm suffered by individuals in particular.

The fact that society, in other contexts, sometimes makes punishment dependent upon the unforeseeable consequences of the offense does not justify permitting a state to declare victim impact information relevant to the sentencing determination in a capital case. The distinction made between an attempted and a completed offense is often invoked by those who advance this argument. See, e.g., *Booth v. Maryland*, 482 U.S. at 519 (Scalia, J., dissenting). It is worthwhile, therefore, that we analyze this particular example.

Respectfully, we submit that this position overlooks the utterly unknowable and indiscernible quality of human

intent. Of necessity, the law draws distinctions based upon a trier of fact's conclusions regarding a particular actor's intent. It is inevitable that such conclusions will involve speculation, and the law should not be forced to ignore this. The law may, therefore, reflect an awareness of the varying degrees of certainty with which findings of intent are made. That is, legislatures should have freedom to assign severity of penalties based upon the confidence that may fairly be placed in a finding of intent made by the trier of fact. Legislatures thus must be permitted to draw lines based upon their judgments about the degree of confidence that may be had in a trier of fact's conclusion in any given context.

There is a plausible rational basis for a legislature's assigning to an unsuccessful attempt a penalty that is less severe than that which the legislature assigns to the completed offense. The fact that the offense is completed is often indicative of the actor's intent. In many cases, for example, the unsuccessful perpetrator may have experienced "cold feet" at the last instant or otherwise exhibited some tendency reflecting a lesser state of culpability than that possessed by the successful offender.

To be sure, there will be occasions when, as pointed out in the dissenting opinions in *Booth* and *Gathers*, there is no difference whatsoever between the unsuccessful and the successful perpetrator in terms of their intent. That is to say, there will be instances when the crime is not completed simply because of a fortuitous development over which the defendant had no control.⁸ Legislatures, however, do not enact laws for particular cases. They must make distinctions that encompass not the particular case, but rather the whole range of possible criminal circumstances.

⁸ The classic illustration of this is, of course, of course, the cold blooded attempt to execute a victim that fails solely because the perpetrator's gun misfires. *Booth v. Maryland*, 482 U.S. at 519. (Scalia, J., dissenting).

Admittedly, legislatures, in addition to making classifications based on intent, also make distinctions based on the harm caused by the actor's conduct. A reckless driver who runs a stop light and kills someone is punished more severely than one who commits the same offense but, fortuitously, causes no injury. *Booth v. Maryland*, 482 U.S. at 516 (White, J., dissenting); *id.* at 519 (Scalia, J., dissenting); *South Carolina v. Gathers*, 490 U.S. at 805 (O'Connor, J., dissenting). In basing punishment on the degree of harm in this instance, however, a legislature takes into account only the loss of life in general, and not the worth of the victim in particular. A legislature thus does not make the punishment more severe when the victim is a priest rather than, say, a prostitute.

2. *The use of unforeseeable victim impact information in non-capital cases may often be justified by the information's relevance to restitution. Furthermore, the use of irrelevant information to enhance punishment in non-capital cases seldom, if ever, violates the Eighth Amendment.*

The disallowance of the use of unforeseeable victim impact information in capital sentencing trials should not be viewed as inconsistent with the states' legitimate interest in using such information in non-capital proceedings. To the extent that restitution is or may be required of a defendant in a non-capital case, unforeseeable victim impact information is undisputedly relevant to the sentencing decision. Death, however, is in no way, shape or form a means of restitution. It is instead the ultimate penalty exacted for the most grievous of affronts to society. The basis for making unforeseeable victim impact information relevant in a non-capital case is, therefore, absent in a capital proceeding.⁹

⁹ In the view of sentencing judges, victim impact statements are most beneficial, not surprisingly, because of the information they provide on the physical impact of the crime. Hillenbrand & Smith, *Victims Rights Legislation: An Assessment of Its Impact on Crimi-*

There are, of course, instances when victim impact information is used in non-capital cases not to impose restitution, but solely to enhance punishment. Even so, this use of victim impact information will seldom, if ever, violate the Eighth Amendment.

The maximum penalty for non-capital offenses is almost always within the range of proportionate punishment allowed by the Eighth Amendment. It necessarily follows, therefore, that the decision on where to place an offender's sentence within the statutorily permissible range will also not invoke the Eighth Amendment. Even if the non-capital sentencing decision is based on irrelevant evidence, no Eighth Amendment violation will have occurred, since the imposition of even the maximum sentence would not have contravened that amendment. At most, an erroneous evidentiary ruling will have been made, and, of course, the Constitution does not exist to cure every such mistake.

In capital cases, though, the situation is altogether different. A death sentence based on irrelevant, prejudicial information always invokes the Eighth Amendment because of the risk that death is being imposed for the wrong reasons. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985) (death sentence reversed because of risk that jury believed it was not making final determination); *Gardner v. Florida*, 430 U.S. 349, 364 (1977) (White, J., concurring) (reversing death sentence imposed after sentencing judge considered confidential information not provided to defendant). Given death's finality, a death sentence imposed for impermissible reasons, or in spite

nal Justice Practitioners and Victims, 1989 A.B.A. Sec. Crim. Just. 71. After this, however, judges find that victim impact statements are most helpful in imposing restitution. *Id.* Hillenbrand and Smith thus conclude that the most dramatic consequence of using victim impact statements in non-capital cases is its effect on restitution. *Id.* at 71, 103, 123. "Clearly, the greatest impact from the judges' perspective relates to restitution—both the number of orders issued and the size of those orders." *Id.* at 71.

of factors that may call for a less severe penalty, is, by definition, disproportionate. *See id.; Lockett v. Ohio*, 438 U.S. 586, 605; *Eddings v. Oklahoma*, 455 U.S. at 119 (O'Connor, J., concurring). A death sentence based on irrelevant prejudicial information thus cannot be tolerated under the Eighth Amendment, even though a sentence based on irrelevant evidence in a non-capital case very rarely invokes that amendment.

C. The use of unforeseeable victim impact information in a capital sentencing trial cannot be justified on the grounds that it is relevant to rebut mitigating evidence offered by the defendant.

The capital sentencer must focus on the offender's state of mind, character, and propensity for future dangerousness. Mitigating evidence on these particular aspects is relevant to the sentencing determination, because it aids the decision on whether the offender should live or die.

It has been stated that, since the defendant may introduce all available, relevant¹⁰ mitigating evidence, unforeseeable victim impact information is relevant to counter the defendant's proof. *Booth v. Maryland*, 482 U.S. at 517 (White, J., dissenting); *id.* at 520 (Scalia, J., dissenting); *South Carolina v. Gathers*, 490 U.S. at 820-21 (O'Connor, J., dissenting); *Tennessee v. Payne*, 791 S.W.2d at 19. There is, however, no symmetry between these two categories of evidence. The former bears directly on whether the offender's state of mind, character, and propensity for future dangerousness warrant execu-

¹⁰ We believe that the Constitution permits a state to limit the type of "mitigating" evidence that a defendant may offer in a capital sentencing trial. If the mitigating evidence does not assist the decision on whether the defendant's state of mind, character, or propensity for future dangerousness warrants execution, it may be excluded as irrelevant. *Cf. Lockett v. Ohio*, 438 U.S. at 608 ("To meet constitutional requirements, a death penalty statute must not preclude consideration of *relevant* mitigating factors") (emphasis added).

tion. The latter merely reveals the unforeseeable consequences of the offense.

Far from having its "hands tied", the prosecution may counter the defendant's mitigating evidence through the cross-examination of defense witnesses, the introduction of its own proof bearing on relevant factors, and the use of appropriate arguments. Rather than constituting an attempt to rebut the offender's mitigating evidence, the use of unforeseeable victim impact information is an effort to inject into the capital sentencing trial altogether different factors that do not prove the offender's state of mind, character, or future dangerousness.

V. THE STATE'S USE OF VICTIM IMPACT EVIDENCE DID NOT CONSTITUTE HARMLESS ERROR.

In order to show that the constitutional error involved here was harmless, the State must demonstrate that the use of the *Booth*-prohibited evidence and arguments was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). The Tennessee Supreme Court erroneously concluded that the State has met this burden.

The crimes in this case were, of course, brutal and shocking. Apart from that fact, however, the State had nothing to support the imposition of death other than the *Booth*-violative victim impact information, the gruesome color video tape that even the trial judge intimated was too inflammatory to introduce during the guilt phase (T. 1493-94), and the theatrics with which the prosecution improperly concluded its final argument. See *Tennessee v. Payne*, 791 S.W.2d at 20 (J.A. 45).

Payne is not the typical "two time loser" who cold bloodedly executed a robbery victim. He was, at the time of these crimes, a twenty year old mentally handicapped laborer, with no prior record. He was described at trial by a clinical psychologist as one of the most polite prison-

ers he had ever interviewed (T. 1530). The State did not introduce any evidence of disciplinary problems or academic misconduct. Nor did it seek to show any clinical evaluation or otherwise attempt to demonstrate any propensity for future dangerousness. The only explanation for these horrible killings consistent with the jury's findings is that Payne "snapped" under the influence of injected cocaine.

Payne was tried under a statute,¹¹ and pursuant to jury instructions (J.A. 21,22), that required him, in order to save his life, to convince the jury that the mitigating evidence outweighed the aggravating circumstances. The State relied heavily on the *Booth*-condemned evidence and arguments to overcome Payne's mitigating evidence. This, of course, made his burden especially onerous. The erroneous use of this information was not harmless beyond a reasonable doubt.

CONCLUSION

For the reasons stated herein, Petitioner respectfully submits that the Court's decisions in *Booth* and *Gathers* should not be overruled; that the Court should determine that the State's use of unforeseeable victim impact information violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution; that his death sentence should be set aside; and that this case should be remanded for proceedings not inconsistent with the Court's judgment.

Respectfully submitted,

J. BROOKE LATHRAM *
LES JONES
130 North Court Avenue
Memphis, Tennessee 38103
(901) 523-2311
Counsel for Petitioner

* Counsel of Record

¹¹ See, *supra* note 1.

BEST AVAILABLE COPY

QUESTIONS PRESENTED

- I. Whether this Court should overrule *Booth v. Maryland* and *South Carolina v. Gathers* to the extent that they prohibit a state from permitting consideration of evidence of victim impact in a capital sentencing proceeding?
- II. Whether the death sentence in this case should be upheld even if *Booth* and *Gathers* are not overruled because any violation of the principles of *Booth* and *Gathers* was harmless beyond a reasonable doubt?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	11
ARGUMENT	15
I. THIS COURT SHOULD OVERRULE <i>BOOTH V. MARYLAND AND SOUTH CAROLINA V. GATHERS</i> TO THE EXTENT THAT THEY PROHIBIT A STATE FROM PERMITTING CONSIDERATION OF EVIDENCE OF VICTIM IMPACT IN CAPITAL SENTENCING PROCEEDINGS ...	15
A. Introduction.....	15
B. Evidence of the full range of harm to society and to the victim's family is relevant to the capital sentencing decision.....	19
C. Evidence regarding the victim's character may be relevant and does not always violate the Constitution.....	36
D. There is no constitutional requirement that there be an absolute bar on admission of the opinions of victims' families as to sentence.....	39
E. The doctrine of <i>stare decisis</i> does not preclude overruling <i>Booth and Gathers</i>	42

TABLE OF CONTENTS - Continued

	Page
II. THE DEATH SENTENCE IN THIS CASE SHOULD BE UPHELD EVEN IF <i>BOOTH AND GATHERS</i> ARE NOT OVERRULED BECAUSE ANY VIOLATION OF THE PRINCIPLES OF <i>BOOTH AND GATHERS</i> IS HARMLESS BEYOND A REASONABLE DOUBT	47
CONCLUSION	49

TABLE OF AUTHORITIES

Page

CASES CITED

<i>Booth v. Maryland</i> , 482 U.S. 496 (1987).....	<i>passim</i>
<i>Byrne v. Butler</i> , 845 F.2d 501 (5th Cir. 1988).....	45
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985).....	40, 41
<i>California v. Ramos</i> , 463 U.S. 992 (1983).....	16, 28, 46
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	17
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977).....	20
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986)	41, 42
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637 (1974)	41, 42
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982).....	19, 20, 31
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....	<i>passim</i>
<i>Garcia v. Metro. Transit Authority</i> , 469 U.S. 528 (1987)	46
<i>Gore v. United States</i> , 357 U.S. 386 (1958).....	16, 46
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976) .	16, 19, 22, 23, 24, 39
<i>Jurek v. Texas</i> , 428 U.S. 262 (1976)	29
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978).....	24
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	38
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983).....	17
<i>Mills v. Maryland</i> , 486 U.S. 367 (1988)	37
<i>People v. Clark</i> , 789 P.2d 127 (Cal. 1990)	34, 44
<i>People v. Kelly</i> , 800 P.2d 516 (Cal. 1990).....	45

TABLE OF AUTHORITIES - Continued

Page

<i>Roberts v. Louisiana</i> , 428 U.S. 325 (1976)	18
<i>Satterwhite v. Texas</i> , 486 U.S. 249 (1988).....	48
<i>Skipper v. South Carolina</i> , 476 U.S. 1 (1986) ...	19, 24, 29
<i>South Carolina v. Gathers</i> , 490 U.S. 805 (1989)	<i>passim</i>
<i>Spaziano v. Florida</i> , 468 U.S. 459 (1984)	23, 27
<i>State v. Alley</i> , 776 S.W.2d 506 (Tenn. 1989).....	17
<i>State v. Boyd</i> , 797 S.W.2d 589 (Tenn. 1990).....	44
<i>State v. Huertas</i> , 553 N.E.2d 1058 (Ohio 1990).....	44
<i>State v. Payne</i> , 791 S.W.2d 10 (Tenn. 1990).....	25, 47
<i>Thornburgh v. American College of Obstetricians & Gynecologists</i> , 476 U.S. 747 (1986)	29
<i>Tison v. Arizona</i> , 481 U.S. 137 (1987).....	31, 39
<i>United States v. Jenkins</i> , 420 U.S. 358 (1975).....	42
<i>United States v. Scott</i> , 437 U.S. 82 (1978).....	42, 43
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	16, 19, 27, 28
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	18, 22, 24, 35
STATUTES	
<i>Tenn. Code Ann. § 39-2-203(i)(1)</i>	37
<i>Tenn. Code Ann. § 39-2-203(i)(9)</i>	37

TABLE OF AUTHORITIES – Continued

	Page
OTHER AUTHORITIES	
Fed. R. Evid. 404(a)(2)	35, 36
Peterson and Seligman, <i>Learned Helplessness & Victimization</i> , J. Soc. Issues (No. 2) 103 (1983)	39
Rule 36(b), Tenn. R. App. P.	17

In The

Supreme Court of the United States

October Term, 1990

PERVIS TYRONE PAYNE,

Petitioner,
vs.

STATE OF TENNESSEE,

*Respondent.***On Writ Of Certiorari To The
Supreme Court Of Tennessee****BRIEF OF RESPONDENT****STATEMENT OF THE CASE**

Petitioner, Pervis Tyrone Payne, was tried by a jury in the Criminal Court for Shelby County, Tennessee, on two counts of murder in the first degree of Charisse A. Christopher and Lacie Jo Christopher, respectively, and one count of assault with intent to commit first-degree murder on Nicholas A. Christopher. The trial commenced on February 9, 1988, and on February 16, 1988, the jury returned a verdict finding the defendant guilty on all counts. Following a sentencing hearing, the jury unanimously found beyond a reasonable doubt the following

statutory aggravating circumstances applicable to both murder victims, Charisse and Lacie Jo: (1) The defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder, and (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. Tenn. Code Ann. § 39-2-203(i)(3) and (5). With regard to the murder of Lacie Jo, the jury additionally found that the murder was committed against a person less than 12 years of age, and the defendant was 18 years of age or older. Tenn. Code Ann. § 39-2-203(i)(1). The jury found no mitigating circumstances sufficient to outweigh the aggravating circumstances and imposed two death sentences. As required by statute, each juror attested to their verdict by signing their names to the verdict form. Tenn. Code Ann. § 39-2-203(f). The trial judge sentenced the petitioner to thirty years for the assault.

On April 16, 1990, upon automatic, direct review pursuant to Tenn. Code Ann. § 39-2-205(a), the Supreme Court of Tennessee affirmed petitioner's convictions and sentences. In upholding the petitioner's sentence of death, the Supreme Court of Tennessee was required to determine (1) whether the sentence was imposed in an arbitrary fashion, (2) whether the evidence supported the jury's findings of the aggravating circumstances and the absence of mitigating circumstances sufficient to outweigh the aggravating circumstances and (3) whether the sentence of death is excessive or disproportionate to the penalty in other cases, given the nature of the crime and the defendant. Tenn. Code Ann. § 39-2-205(c)(1), (2), (3) and (4). By order of February 15, 1991, this Court issued a

writ of certiorari and, on February 19, 1991, the Court issued an amended writ of certiorari.

A. Trial: Guilt Phase

On the afternoon of June 27, 1987, Nancy Wilson, the resident manager of the apartment building where Charisse Christopher lived and who resided in the apartment directly beneath the Christophers, heard 28-year-old Charisse screaming, "Get out, get out," as if she were telling the children to leave. The noise briefly subsided and then began again and was "terribly loud, horribly loud." The resident manager called the police, saying she heard a blood-curdling scream from the upstairs apartment where Charisse Christopher lived. (R., XI, 631-34). Laura Picard, visiting her sister who lived in the apartment building, was sunbathing by the pool when she heard a noise like a person moaning. She heard a door banging and saw the back door to the victims' apartment slam open and shut three or four times. A dark-colored hand, with a gold watch on the wrist, protruded out the back door and kept trying to slam the door. (R., XI, 606-09).

The first officer on the scene saw a man standing on the second floor landing of the apartment. He came through the front door of the building carrying an overnight bag and a pair of tennis shoes and he had "blood all over him. It looked like he was sweating blood," according to the officer. The officer thought he was responding to a domestic call. He inquired of the man, later identified as the petitioner, how he was doing because he suspected the man had been injured. The petitioner responded, "I'm

the complainant." When the officer asked what was going on upstairs, the petitioner struck the officer with the overnight bag and began to run. (R., XII, 671-72).

When officers opened Charisse Christopher's apartment, they found blood everywhere. Charisse Christopher was on the floor in the kitchen. Lacie Christopher, two and one-half years old, was lying on the floor on her stomach. (R., XII, 676-77, 739). A baseball cap, later identified as belonging to the petitioner, was snapped on her arm near her elbow. A bloody butcher knife lay at her feet. (R., XII, 699-701). Paramedics quickly determined that Charisse and Lacie were dead. (R., XII, 739-42). Nicholas Christopher, three and one-half years old, was lying on the floor and was still breathing despite multiple knife wounds all over his body. One deep laceration of his abdomen caused his intestines to protrude out of the wound and onto the floor. Nicholas' eyes were wide open and he was still breathing. When one of the officers touched the boy, Nicholas started to move his arms and legs. On the way to the hospital, Nicholas held a wet pack to his protruding intestines to keep them moist. (R., XII, 749, 774-83). The officers at the scene collected various items of evidence, including the butcher knife, which was determined to be the murder weapon. (R., XII, 744-45).

The petitioner was subsequently located in the attic of a nearby apartment. He had blood on his body and three or four scratches across his chest. He was sweating and had trouble catching his breath. As he came down from the attic, he said to the officers, "Man, I ain't killed no woman." His pupils were contracted and he was foaming at the mouth. A packet was removed from his pockets which later tested to be cocaine. The police also

found a syringe wrapper and an orange cap from a hypodermic syringe. (R., VIII, 884-89). The overnight bag that the petitioner used to strike the officer was found in a dumpster in the area and it contained a bloody white shirt, among other items of clothing. (R., XIII, 940-42). When walking to the patrol car, the petitioner repeatedly stated, "It happened too fast." (R., XIII, 904-05). At the police station, officers removed a gold watch from the petitioner's person. (R., XIII, 906-07).

Charisse Christopher sustained forty-two knife wounds to her chest and abdomen and forty-two defensive wounds on her arms and hands, representing forty-one separate thrusts or stabbings. None of the wounds penetrated a large vessel and the cause of death was bleeding from all the wounds. Thirteen of the wounds were very serious and could have caused death by themselves. (R., XI, 481-86, 493-94). Charisse Christopher was menstruating and a used tampon was found by her body. (R., XI, 489-90; XII, 680). A specimen from her vagina tested positive for acid phosphatase, a result consistent with the presence of semen, but not conclusive absent sperm. No sperm was found. (R., XI, 489-90).

Lacie Christopher's death was also caused by multiple stab wounds to the chest, abdomen, back and head. There were a total of nine stab wounds. One of the wounds cut the aorta and would have been fatal. (R., XI, 490-92). Nicholas' wounds required seven hours of surgery during which he required seven units of blood, representing complete replacement of his blood. (R., XIII, 827-28). The most severe wound to Nicholas was in his

abdominal area where the knife had pierced him from the front to the back. The stabbing had lacerated his stomach, pierced holes in his abdominal muscle, small and large intestines, and colon and had entered his spleen, liver, and vena cava. Nicholas also sustained knife wounds to his neck, legs, hands, arms, and chest. (R., XIII, 816-18, 822-27).

Evidence introduced at trial established that blood of the same type as that of Charisse and Lacie was found on the petitioner's shirt, tennis shoes and overnight bag. (R., XIV, 1083-85). Blood of the same type as Nicholas was found on the pants the petitioner was wearing when arrested. (R., XIV, 1081-82). Human blood stains were found on the petitioner's wristwatch but there was not enough to conduct a blood-typing test. (R., XIV, 1082-83). Three beer cans, two unopened, were found in the victim's apartment. Tests established that the petitioner's fingerprints were on them. The petitioner's fingerprints were also found on the telephone and counter in the kitchen. (R., XIV, 1066-68).

In his defense, the petitioner claimed that he did not harm Charisse, Lacie or Nicholas. He maintained that he saw a black man come down the inside stairs and run by him. He said he heard a baby crying for help when he reached the landing and saw that the door was ajar. He maintained that he entered the apartment and pulled the knife out of Charisse's neck. He testified that the boy was on his knees crying and that he told Nicholas not to cry, that he was going to get help. He maintained that he got the blood on his clothing and body when he pulled the knife out of Charisse's neck. He said, "She reached up

and grab me and hold me, like she was wanting me to help her. . . ." He went to get some water when he thought he was going to vomit and then left to "bang" on some doors to get help but when he saw the police officer he panicked. According to petitioner's story, Charisse was still alive and able to speak when he left the apartment. (R., XV, 1215-34). On cross-examination, when asked to explain how he got blood stains on his left leg, he said it probably occurred when Charisse hit the wall and "splashed," although he then denied so testifying. (R., XVI, 1278-80). There was blood smeared on one of the walls and on the back door from the floor up to a height of approximately six or seven feet. (R., XIII, 927-42).

The petitioner presented five character witnesses who testified regarding his good reputation for truth and veracity. (R., XVI, 1320-31).

B. Trial: Sentencing Phase

At the sentencing phase, the state specifically incorporated by reference all of the evidence introduced during the guilt phase. The state also presented two witnesses: Mary Zvolanek, who was Charisse's mother, and a detective from the police department. Her testimony was as follows:

Q: Ms. Zvolanek, how has the murder of Nicholas's mother and sister affected him?

A: He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie.

And I tell him yes. He says, I'm worried about my Lacie.

(A. 2-3).

Nicholas, the child referred to in this testimony, is the same child who petitioner attacked along with Charisse and Lacie. Petitioner was found guilty of assault with intent to commit murder for his attack on Nicholas and was sentenced to thirty years' imprisonment.

Detective Wilson presented two minutes of a video tape that was made at the crime scene which depicted the bodies of Lacie and Charisse before they were removed. (XVIII, 1505-06).

The petitioner presented the testimony of his girlfriend, his mother, his father, and a doctor. His girlfriend, Bobbie Thomas, testified that she had a troubled marriage and that the defendant was a very caring person and that the time he had devoted to her children had helped them. She testified that the petitioner loved her children just as if he was their father and that her children still ask about the petitioner. (R., XVIII, 1508-11).

Petitioner's mother and father testified that petitioner had no prior criminal record, had no history of alcohol or drug abuse, worked in his father's business as a painter, was a good worker, was good to children, and was generally a good son. (R., XVIII, 1557-71).

Dr. Hutson, a clinical psychologist, testified that the petitioner tested one standard deviation below the norm of average intelligence. A test further indicated that he scored above normal in the area of schizophrenia; he

"was moving toward psychotic", but it was his opinion that the petitioner was neither psychotic, nor schizophrenic. (R., XVIII, 1515-30).

After the proof concluded at the sentencing hearing, the prosecutor argued, in part, during initial argument:

But we know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and his baby sister.

Is that heinous? Is that atrocious? Is it cruel? Can you think of anything more torturous than that? Is there anything more outrageous than that? The imagination cannot even think of anything worse than that.

(A. 9).

He continued:

There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There obviously is nothing you can do for Charisse or Lacie Jo. But there is something you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to not want to know what happened. And he's going to know what happened to his baby sister and his mother. He is going to want to know what

type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer.

(A. 12).

In her rebuttal argument, the prosecutor said:

... And there won't be anybody there - there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby. (A. 14).

* * *

Mr. Garts wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who loved Charisse Christopher, her mother and daddy who love her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever. (A. 15-16).

* * *

Mr. Garts says but Pervis Payne has lived an exemplary life for twenty years. Well, what about Charisse, for twenty-eight years? What about Lacie Jo, for two years? They lived exemplary lives. But they are not here with us anymore. You have to weigh what has happened.

Ladies and gentlemen of the jury, this is the last thing I am going to say to you. But I want you to think about this when you go back into

your jury room. We have heard a lot about Charisse Christopher, Lacie Jo and Nicholas, and how they were as they appeared before Pervis Payne came into their lives. And this is what he did to them. Did they deserve it? Are you going to let it go unpunished?

(A. 17).

The Tennessee Supreme Court held that the testimony of Nicholas' grandmother did not create an unacceptable risk of the arbitrary imposition of the death penalty and was harmless beyond a reasonable doubt. It further found that the prosecutor's argument did not constitute error. (A. 40-43).

SUMMARY OF ARGUMENT

This case is an appropriate one for the Court to reconsider the overly inclusive and overly constrictive rules promulgated in *Booth v. Maryland* and *South Carolina v. Gathers*. In this case, the petitioner complains about introduction of proof under all three of the principal classifications of victim impact evidence: (1) harm to the victim and the victim's family, (2) characteristics of the victim, and (3) opinion of the victim's family as to sentence. Each type of victim impact evidence warrants an independent analysis.

The first type of victim impact evidence, that of harm to society and to the victim's family, is relevant to the sentencing decision in capital cases because it informs the jury of the defendant's personal responsibility. Two

underlying reasons support allowing a jury to consider the defendant's personal responsibility for the full extent of the harm his act caused. First, evidence of the effect of a murderer's act upon society is crucial to society's legitimate need to exact retribution and accord a full measure of punishment for all of the harm caused. Second, allowing consideration of the full range of harm caused by a defendant's intentional criminal conduct is necessary for the sentencer to make a fully informed and particularized moral decision in each case. Additionally, the holding in *Booth* that only those acts which are relevant to the defendant's mental state may be admitted during the sentencing phase results in an unworkable rule of law. *Booth* and *Gathers* thus present a major distortion in the Court's constitutional jurisprudence and should be overruled.

Notwithstanding the proposition that victim impact evidence should be admitted as relevant to the defendant's personal responsibility, such evidence should also be admissible where it establishes moral culpability. The Court's conclusion in *Booth* that such evidence never speaks to blameworthiness results from a needlessly restricted definition of the term. A defendant is morally culpable for all of the harm which should have been "reasonably anticipated". What may be "reasonably anticipated" depends upon (1) the defendant's awareness of particular circumstances of the crime or the victim's life or (2) that which falls within the range of possible consequences of crime drawn from human and societal experience. Harm which should have been reasonably anticipated constitutes a mental state that should be taken into account in capital cases. Evidence of such harm serves to inform the sentencer of the defendant's moral culpability and is in fact highly relevant to the moral

judgment which must be exercised by the jury in imposing sentence.

If this Court decides that evidence of harm should not be independently admitted on the basis of either personal responsibility or moral culpability, *Booth* should still be overruled because it fails to acknowledge that there are other ways that such evidence may be admitted. In this case, for example, much of the victim impact testimony was intertwined with proof of the crime itself. In many instances, such proof will be admitted during the guilt/innocence phase. It creates an anomaly to permit the evidence to be introduced during the guilt/innocence phase but to prevent references to it during the sentencing phase since the same jury must make their determination as to sentence based on the circumstances of the crime as well as the characteristics of the defendant.

The second type of victim evidence, that regarding the characteristics of the victim, also can be relevant to the decision of the jury in capital cases. The decisions in *Booth* and *Gathers* fail to acknowledge the many ways that such evidence may come to the attention of the jury. In many cases, such proof will be properly admitted as part of the circumstances of the crime or as part of the harm caused to society or the victim's family! It may also be admitted to establish a particular aggravating circumstance. Introduction of such evidence does not violate the Constitution. Moreover, proof about the victim's characteristics should also be admissible in order to remind the jury that the victim was a unique individual. Rather than barring evidence when it is offered to paint a "thumbnail sketch" of the victim, the Court should find that evidence about the victim's characteristics is admissible so long as

such evidence does not tend to suggest an impermissible basis for decision, such as race, and so long as the focus of the jury is not shifted to a weighing of the merits of the defendant's life against the life of the victim.

Similarly, *Booth* erroneously concludes that introduction of the third type of victim impact evidence, opinion of the victim's family as to the appropriate sentence, always constitutes a constitutional violation. It further fails to acknowledge that the expression of opinion by the victim's family can help to ameliorate feelings of helplessness and lack of control and channelize their desire for retribution. So long as the manner of expression does not lead a jury to believe that the decision is not theirs to make, no constitutional violation should occur.

The doctrine of *stare decisis* does not preclude overruling these cases. While *stare decisis* is the general rule in our system and serves important functions, this Court is generally more willing to overrule prior law when the erroneous holding involves a constitutional principle because legislative correction is impossible. Further, a restrictive constitutional decision often interferes, as it does here, with democratic self-governance, warranting flexibility in reconsidering prior decisions. Specifically, the rules promulgated in *Booth* and *Gathers* should be overruled because, among other things, (a) they produce confusion in application; (b) they rest on a mistaken practical assessment of the need for a prophylactic rule broader than any legitimate constitutional command; and (c) they rest on principles that cannot fairly be reconciled with the Constitution or other decisions of this Court. Finally, the Court's willingness to bow to the "force of better reasoning" is especially important in capital cases

which purport to reflect "an evolving standard of decency".

In any event, even if this Court determines that *Booth* should not be overruled, the death sentence in this case should be affirmed. As the Supreme Court of Tennessee found, the heinous nature of the crime petitioner committed was so great that the sentence of death was the "only rational punishment available." Thus, any error was harmless beyond a reasonable doubt.

ARGUMENT

I. THIS COURT SHOULD OVERRULE *BOOTH V. MARYLAND AND SOUTH CAROLINA V. GATHERS* TO THE EXTENT THAT THEY PROHIBIT A STATE FROM PERMITTING CONSIDERATION OF EVIDENCE OF VICTIM IMPACT IN CAPITAL SENTENCING PROCEEDINGS.

A. Introduction

This case represents the fourth time in four years that the admissibility of victim impact evidence has been addressed by this Court. Clearly, this Court and the states are at best uneasy with the overly inclusive rule promulgated in *Booth v. Maryland*, 482 U.S. 496 (1987). Perhaps part of the problem lies in the lack of recognition of the growing demand for victim impact evidence as a component of the "evolving standards of decency" of a maturing society. *Booth*, 482 U.S. at 520 (Scalia, J., dissenting). In *Booth and South Carolina v. Gathers*, 490 U.S. 805 (1989), the Court strayed from the fundamental principles which traditionally have provided enlightenment on

these evolving standards. See *Furman v. Georgia*, 408 U.S. 238, 442-43 (1972) (Powell, J., dissenting). As observed by the Court in *Woodson v. North Carolina*, 428 U.S. 280 (1976) “[t]he two crucial indicators of evolving standards of decency respecting imposition of punishment in our society . . . ” are jury determinations and legislative enactments. *Id.* at 293. *Booth’s* treatment of the actions of thirty-six legislatures¹ in permitting victim impact evidence in criminal trials suggests that the Court gave no deference to the latter source, but instead substituted their subjective values. 482 U.S. at 509 n. 12. This Court has repeatedly cautioned against this temptation. *Furman v. Georgia*, 408 U.S. at 466-67 (Rehnquist, J., dissenting); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

Also implicit in the *Booth* and *Gathers* decisions is the Court’s abandonment of its reluctance to “dictate to the state[s] particular substantive factors that should be relevant to the capital sentencing decision.” *California v. Ramos*, 463 U.S. 992, 999-1000 (1983); *Gore v. United States*, 357 U.S. 386, 393 (1958). The Court has departed from these and other well-established principles of Eighth Amendment jurisprudence due to a mistaken practical assessment regarding the manner in which admission of this class of evidence in capital sentencing should be controlled. Guided by that mistaken assessment, it has

adopted a broad prophylactic rule which, though spawned by a legitimate concern for unfair prejudice suggested by certain aspects of this type of evidence, *Booth*, 482 U.S. at 505-08, is unsupported by any legitimate constitutional demand.

This case is an appropriate one for the Court to reconsider the overly broad and overly constrictive rules promulgated in *Booth*.² It contains the three principal classifications of victim impact evidence recognized in *Booth*: (1) harm to the victim and the victim’s family; (2)

² Although the Supreme Court of Tennessee found any error to be harmless beyond a reasonable doubt, that finding does not constitute an adequate and independent state ground for the decision. First, the Court’s reliance on *State v. Alley*, 776 S.W.2d 505 (Tenn. 1989), as precedent does not require the conclusion that the Court was applying a state harmless error analysis rather than one appropriate for federal constitutional errors. Indeed, the use of the standard, “harmless beyond a reasonable doubt,” in this case and in *Alley* implies a federal constitutional analysis, and not the application of Tennessee’s harmless error provision. See *Chapman v. California*, 386 U.S. 18, 24 (1967). Cf. Rule 36(b), Tenn. R. App. P. (error is harmless unless, “considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process”). In any event, the citation to *Alley*, standing alone, falls far short of the “plain statement” required by this Court in *Michigan v. Long*, 463 U.S. 1032 (1983). In the absence of such a plain statement, this Court has held that it will accept “as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.” *Id.* at 1041. Furthermore, even if the Supreme Court of Tennessee did rely on state law, it is clear that it did so not on an independent basis, but because it felt compelled to do so by this Court’s ruling in *Booth*.

¹ Through 1988, forty-four states had adopted statutes providing for victim impact information in the sentencing process. Appendix to Brief of Amici Curiae Washington Legal Foundation, The Reverend Dorothy Haynes, The Sunny Von-Bulow National Victim Advocacy Center, The Stephanie Roper Committee, Inc., The Crime Victims Legal Clinic, Parents of Murdered Children, The Unity Group, Inc., and the Allied Educational Foundation, *South Carolina v. Gathers*, 490 U.S. 805 (1989).

characteristics of the victim; and (3) opinion of the victim's family as to sentence. *Booth*, 482 U.S. at 502. Further, in this case, the circumstances of presentation suggest a use of this evidence far below the level of concern expressed by the majority in *Booth*. Petitioner's complaint about the brief testimony of Mrs. Zvolanek relating Nicholas's psychological problems in coming to grips with the deaths of his mother and little sister press the outer limits of credibility. Indeed, given the petitioner's intent to have snuffed out the life of this four-year-old, a result for which he clearly could have been held fully responsible, it strains credulity for petitioner to complain about the fortuitous circumstance that Nicholas survived and was capable of experiencing psychological pain and suffering.

Each type of victim impact evidence warrants independent analysis. In undertaking this analysis, focus must remain on the phase of the sentencing process with which *Booth* and *Gathers* deal. This has been identified by the Court as the selection phase,³ *Zant v. Stephens*, 462

³ The respondent does not imply that a state's decision to use victim information as the basis for a statutory aggravating circumstance necessarily creates any constitutional infirmity. Cf., *Roberts v. Louisiana*, 428 U.S. 325, 332 (1976) (status of victim as peace officer as aggravating circumstance). In fact, many of the same arguments for allowing introduction of victim impact evidence at the "selection phase" of a capital sentencing proceeding also apply to the use of such evidence in the "narrowing phase" of the proceeding. The respondent merely wishes to point out that this case, like *Booth* and *Gathers*, involve the "selection phase," which means that the Eighth Amendment's crucial requirement of statutory guidance of sentencer discretion has already been satisfied prior to the introduction of the victim impact evidence.

U.S. 862, 879 (1983). As this Court has observed in *Zant*, once there is identified at least one statutory aggravating factor which qualifies the defendant as death eligible, the concerns of *Furman* that the penalty not be freakishly and wantonly imposed have been met. *Zant*, 462 U.S. at 876 n. 14; *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976). After the death eligible class has been identified, the Court has insisted upon a broad particularized inquiry at the selection phase to insure that a person is not arbitrarily put to death solely by the category of crime committed. *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring); *Woodson v. North Carolina*, 428 U.S. at 304.

- B. Evidence of the full range of harm to society and to the victim's family is relevant to the capital sentencing decision.
 - 1. Evidence of harm is relevant because it informs the jury about the level of defendant's personal responsibility.

At the most basic level, *Booth* and *Gathers* are deeply wrong in ruling that the Constitution forbids a state to base a capital punishment decision on the full range of harm caused by the murderer. The entire focus of *Booth* is on the defendant's mental state (blameworthiness or moral culpability). *Booth*, 482 U.S. at 504.

However, a capital jury must decide whether the death penalty should be imposed based upon the defendant's "personal responsibility and moral guilt". *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (emphasis added); *Booth*, 482 U.S. at 502. The extent of harm for which society deems an individual accountable bears upon the extent of one's personal responsibility. *Booth*, 482 U.S. at 518

(Scalia, J., dissenting). Indeed the range of harm for which one should be held accountable is essential to the proposition of personal responsibility. Since the full range of harm caused by a defendant is relevant to his personal responsibility, the introduction of such evidence, unless otherwise constitutionally barred, is appropriate. That punishment should depend solely on the state of a defendant's mind is a proposition which is not reflected in the "text of the Constitution, nor in the historic practices of our society, nor even in the opinions of this Court." *Booth*, 482 U.S. at 520 (Scalia, J., dissenting). Punishment must depend also upon a defendant's "personal responsibility". *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977). The present case illustrates the departure by the Court from the traditional criminal law principle that the extent of harm done is a relevant consideration in setting punishment.⁴

In this case, defendant acted identically as to two-and-one-half-year-old Lacie Jo and three-and-one-half-year-old Nicholas. He brutally stabbed both children repeatedly. There was no difference in his mental state toward each as he fully intended to kill them both. The

only difference lay in that fundamental margin of harm between life and death. The harm done to Nicholas was fortuitously less than to Lacie Jo. As to Nicholas, punishment could not exceed a term of imprisonment. However, as to Charisse and Lacie Jo, the petitioner faces death. The respective punishments were differentiated by the harm for which petitioner should be held individually accountable, *i.e.*, his "personal responsibility". This case presents in principle the hypothetical posed by Justice Scalia in his dissenting opinion in *Booth* to demonstrate that the extent of harm measures the level of responsibility:

The Court's opinion does not explain why a defendant's *eligibility* for the death sentence can (*and always does*) turn upon considerations not relevant to his moral guilt. If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater.

Booth, 482 U.S. at 519 (Scalia, J., dissenting) (emphasis in text).

⁴ While the Supreme Court of Tennessee deemed the testimony of Mrs. Zvolanek of the effect on Nicholas to be "technically irrelevant," (A. 40), a fair reading of the court's opinion leads to the inescapable conclusion that the court was simply saying that the testimony was "technically irrelevant" under the rule announced by this Court in *Booth* and not that such information was generally irrelevant to the jury's decision. This distinction becomes clear when the court writes, in discussing the prosecutor's argument related to the harm caused, that such was "relevant to this defendant's personal responsibility and moral guilt." (A. 42).

This class of evidence does not *per se* violate any constitutional provision. Before evidence of victim harm becomes a subject of jury consideration, the class of persons eligible for the death penalty has already been narrowed to include the defendant. Thus, evidence of harm to society does not impact the class of persons who are "death eligible," but is evidence of the defendant's personal responsibility and moral culpability to aid the jury

in making its decision. As such it does not give rise to the arbitrariness and capriciousness constitutionally condemned by *Furman*. There is no constitutional bar to prevent the jury from considering factors beyond those which are set out in the statute as aggravating circumstances.

Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition; they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. [footnote omitted].

Zant v. Stephens, 462 U.S. at 878.

There are at least two underlying reasons that support holding a defendant personally responsible for the full range of harm caused by his intentional criminal conduct. First, evidence of the effect of a murderer's act upon society is crucial to the legitimate need of society to further the ends of retribution and to ensure a full measure of punishment for all of the harm caused.

Punishment is designed, at least in part, to exact retribution for a crime. Retribution is an objective that is "not inconsistent with our respect for the dignity of men." *Gregg v. Georgia*, 428 U.S. at 183. Rather, the death penalty is "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the

penalty of death." *Id.* at 184. More recently, this Court has written that "retribution is an element of all punishments society imposes" and "clearly plays a more prominent role in a capital case". *Spaziano v. Florida*, 468 U.S. 447, 462 (1984). The measure of retribution not only depends on how depraved the defendant's intent was but also should include the suffering he has inflicted on the society that is punishing him. The greater the harm, the more worthy the individual is of blame and the greater the penalty society may demand. Accordingly, all of the harm caused by the defendant's actions is highly relevant to the moral judgment which must be exercised by the jury in deciding what sentence to impose.

In this case, the petitioner brutally butchered to death Charisse Christopher and Lacie Jo Christopher in the presence of three-and-one-half-year-old Nicholas. Surely the State of Tennessee is entitled to exact retribution for the full range of the petitioner's heinous acts, including the fact that Nicholas is now motherless and must suffer all the psychological harm which results from witnessing petitioner's brutal acts. As a result of this Court's erroneous conclusion in *Booth*, the unintended and unforeseen impact on society and the victim's family can never be relevant to establishing the defendant's punishment. Consequently, states are prevented from punishing a murderer to the full extent of his personal responsibility.

The second reason for allowing consideration of the full range of harm caused by a defendant's intentional criminal conduct is that such consideration is necessary for the sentencer to make a particularized, fully informed

moral decision. The Court's exclusive focus on a defendant's state of mind unduly constricts the specific assessment of the defendant which is essential to capital sentencing. It is obvious that the full extent of harm brought about by the intentional acts of a particular defendant are unique to each case. Accordingly, to assume at the selection phase that the range of harm for which all murderers will be held accountable is the same precludes the fully informed moral decision which must be made on a particularized basis. This Court has held that, in all but the rarest cases, the defendant must be permitted to present whatever mitigating factors he wishes as they relate to his character or the circumstances of the offense. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Indeed, the Court has even held that he must be permitted to introduce in mitigation *any* evidence that might convince the jury that he deserves a sentence less than death. *Skipper v. South Carolina*, 476 U.S. at 4. Yet, the jury is called upon to make a grave moral decision as to life or death of this individual without regard to the principles of personal responsibility. Evidence about the full extent of harm caused and for which he should be held accountable is essential to a fully informed moral decision. Denying such evidence renders the jury unable to fully speak for the public and to serve as a "significant and reliable objective index of contemporary values" as required by *Gregg*. *Gregg*, 482 U.S. at 181. It precludes the jury from making a decision which is truly a "uniquely, individualized judgment regarding the punishment that a particular person deserves." *Zant v. Stephens*, 456 U.S. at 900. This bar against particularized "personal responsibility" arouses a sense of one-sided unfairness in the

State's inability to present proof parallel to that being presented to the defendant in mitigation. This sense was expressed by the Tennessee Supreme Court in this case:

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon . . . the harm imposed, upon the victims.

State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990) (A. 42).

In this case, the victim impact testimony which was admitted by the State was extremely limited. It came during the testimony of Mary Zvolanek, the mother of the adult victim and the grandmother of both the child who was murdered and the surviving child. Her testimony covers less than one and one-half pages of the transcript. The specific testimony is as follows:

Q: Ms. Zvolanek, how has the murder of Nicholas's mother and sister affected him?

A: He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, "I'm worried about my Lacie."

(A. 2-3).

Considering the testimony presented by the petitioner, it is anomalous that this limited testimony as to the crime's harm to Nicholas's emotional well being could be constitutionally inadmissible. During the same sentencing hearing, the petitioner's girlfriend was allowed to give testimony which directly paralleled the testimony of Mrs. Zvolanek. In the following colloquy, she responded to a question from the defense attorney as to the effect of these charges on her children:

Q: Was he [the petitioner] attentive, or how did he behave?

A: Just like a father that loved his kids.

Q: Has the whole thing shocked you?

A: Yes it has, it has also shocked them [the children] and they still don't – they believe he's innocent and *they ask about him all the time*.

(R. XVIII, 1511) (emphasis supplied).

It strains credulity that Eighth Amendment jurisprudence requires that the jury be permitted to hear that the children of the petitioner's girlfriend "ask about him all the time," yet that same jury is prohibited by the Constitution from hearing that the child of the victim and a victim himself continues to ask about his slain mother and sister. It also strains credulity that the Constitution permits a defendant to introduce testimony that he loved children and got along wonderfully with them, but does not permit evidence regarding the effect on a child who is motherless as the result of his acts. To allow a defendant to place such information before the jury, but to bar the State from offering parallel evidence, denies the jury proof of equivalent moral legitimacy and prevents it from

making a fully individualized decision based upon the personal responsibility of the particular defendant.

In his dissenting opinion in *Furman v. Georgia*, Justice Blackmun expressed concern for not extending the sentencing considerations to include the full extent of harm occasioned by a particular defendant:

It is not without interest, also, to note that, although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of those opinions make reference to the misery the petitioners' crimes occasioned into the victims, to the families of the victims, and to the communities where the offenses took place . . . These cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked.

Furman, 408 U.S. at 413-14 (Blackmun, J., dissenting).

As pointed out in Justice White's dissent in *Booth*, it is difficult to reconcile why punishment can be enhanced based upon the harm caused in all criminal cases except capital cases. *Booth*, 482 U.S. at 516. Indeed, this Court has said that ". . . a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding – a determination of the appropriate punishment to be imposed on an individual." *Spaziano v. Florida*, 468 U.S. at 459. The majority in *Booth* sought to justify its holding banning victim impact evidence in capital cases, but not in other criminal cases, by noting that "death is a punishment different from other sanctions." *Booth*, 482 U.S. at 509 n. 12, quoting *Woodson v.*

North Carolina, 428 U.S. 280, 303-304, 305 (1976). The Court's statement in *Woodson* that "death is different" was based on the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 305. The Court held that North Carolina's procedural framework in making the death penalty mandatory in certain cases was unconstitutional because it did not insure the heightened degree of reliability needed in capital cases. Thus, the proposition that "death is different" compels the need for greater *procedural* safeguards. However, if evidence of the full range of harm caused by a defendant is truly irrelevant because it does not inform the sentencer of the defendant's mental state, then it should be equally irrelevant in all criminal cases. While the severity of the penalty in capital cases requires greater procedural safeguards, the qualitative difference in penalty cannot justify any difference in the substantive determination of whether a particular class of evidence is relevant.

Finally, the holding in *Booth* that only those factors which are relevant to defendant's state of mind may be admitted at the sentencing phase results in an unworkable rule of law. If *Booth*'s holding is followed to its logical conclusion, conflicts are created both with earlier capital sentencing cases and criminal law in general. This Court has held that a jury instruction in the sentencing phase that a governor may commute a sentence of life without parole to life with the possibility of parole does not violate the Constitution, *California v. Ramos*, 463 U.S. at 1001-09, even though such information does not speak to the defendant's moral culpability. Further, the jury may consider whether a defendant is likely to commit

other crimes of violence in the future when deciding on which sentence to impose. *Jurek v. Texas*, 428 U.S. 262, 272 (1976). Clearly, future dangerousness does not inform the jury about the defendant's moral culpability for the crime for which he is being sentenced. Similarly, the Court has held that a defendant must be allowed to present any evidence that might serve as a basis for a sentence less than death, even if it does not relate to his culpability for the crime he committed. *Skipper v. South Carolina*, 476 U.S. at 4-5.

As petitioner points out, a precedent should be overruled when experience demonstrates that the holding has resulted in a "major distortion in the court's constitutional jurisprudence." Pet. Br., 49, quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). Clearly, the Court's decision in *Booth* that *only* evidence which relates to the defendant's moral culpability is relevant to the jury's sentencing decision is a major distortion of the Court's constitutional jurisprudence and results in an unworkable scheme because it tears at the very fabric of commonly accepted notions of criminal responsibility in punishment.

2. Evidence of harm to society is relevant because it informs the jury about the defendant's moral culpability.

The majority of this Court in *Booth* held that the impact of a murderer's act on family members and society as a whole was inadmissible because such factors

"may be wholly unrelated to the blameworthiness of a particular defendant." *Booth*, 482 U.S. at 504. As set out in section 1, *supra*, evidence relating to the full range of harm caused by a murderer should be admitted as relevant to a defendant's "personal responsibility". Notwithstanding this proposition, evidence of harm to society and to the victim's family should still be admitted where it establishes the defendant's moral culpability.

The Court's conclusion in *Booth* that such evidence is generally unrelated to the defendant's blameworthiness is erroneous and results from an unjustifiably restricted definition of that term. Whenever a defendant chooses to commit an intentionally criminal act, he should properly be viewed as morally culpable for any and all harm that could have been reasonably anticipated to occur as a result of that crime. A sentencer's conclusion that such additional harm could have been "reasonably anticipated" might be based on a defendant's awareness of particular circumstances of the crime or of the victim's life situation.⁵ Or, alternatively but no less significantly,

⁵ The extent of the harm caused to Nicholas was certainly within the reasonable anticipation of the petitioner. The petitioner's girlfriend lived in the apartment across the hall from the victim and her small children, and he was a frequent visitor at his girlfriend's apartment. The petitioner must have known prior to entering the apartment that two small children and their mother were present or, if not, he certainly became aware of these facts upon entering the apartment. Any reasonable person would have anticipated that he was causing harm to Nicholas as he struck his fatal blows to Nicholas' mother and sister. It could not have come as a surprise to anyone that these acts would cause Nicholas psychological, as well as physical, harm.

this conclusion might be based on an understanding of the full range of possible consequences of the crime drawn from human and societal experience. It is a fact of life that human beings live within a community of family and friends, and participate in a complex web of human relationships. Any murderer should anticipate that killing a person will sever the web of interpersonal relationships, and, therefore, will almost inevitably harm others besides the murder victim. This constitutes a culpable mental state that may be taken into account in capital cases whenever the defendant's intentional conduct causes its natural, although not inevitable, consequences. *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987).⁶

Significantly, even the petitioner in this case admits that moral culpability, as this Court referred to the

⁶ The state of mind described in the text is not the same as the "reckless indifference" standard adopted in *Tison*, although the analytical framework resembles that in *Tison*. The difference is that, in *Tison*, as in *Enmund*, the issue was the defendants' level of moral culpability for the primary harm caused by their crime, i.e., the deaths of the murder victims. The *Tison* Court properly insisted on a relatively high level of moral culpability with respect to the victims' deaths as a prerequisite to finding, in the first instance, that the death penalty would be a proportional punishment for the defendants' crimes. Here, on the other hand, there is no doubt that the petitioner was morally culpable, at the highest possible level, for the intentional murders of Charisse and Lacie Jo, and is thus properly death-eligible based on the *Tison* proportionality standard. The issue here, by contrast, is whether the petitioner's relatively lower level of moral culpability with respect to the additional harm caused to Nicholas can be used as simply one factor in the overall moral decision of whether to actually impose a death sentence.

concept in *Booth*, includes harm that a defendant neither intended to cause nor even knew would occur. The petitioner, in fact, appears to agree that all harm that could be reasonable anticipated to result from a defendant's intentional crime lies properly within the scope of the defendant's moral culpability. Pet. Br., 12-13 (referring to the "foreseeable" consequences of a crime as "relevant to show moral blameworthiness"). The petitioner simply argues that the state may not introduce the *actual* consequences of the crime (even if those consequences were, in fact, "foreseeable" to the defendant), but instead must limit its discussion of victim harm to speculation about what *might* have happened as a result of the defendant's crime. Neither the Eighth Amendment, nor any other constitutional provision, requires this Court to adopt such a convoluted and illogical rule.

As the petitioner in this case appears to suggest, a defendant's moral culpability is dependent upon the full range of what a defendant could or should have anticipated might occur, as of the time the crime was intentionally committed. Pet. Br., 13. It would be completely appropriate, therefore, within the context of moral culpability, for a state to punish a defendant for *all* reasonably anticipated harm, *whether or not* the harm actually occurred in the particular case. In our system of criminal justice, however, we do not always choose to punish to the full extent of moral culpability for those harms that were risked by a defendant's conduct but that did not occur. Rather, we sometimes allow defendants to benefit from the "fortuity" that not all of their anticipated harms actually occur. This does not negate the principles that such defendants are properly viewed as morally culpable

for all anticipated harms – instead, it stands as an example of our society's willingness to impose less punishment, in some cases, than a defendant's moral culpability would otherwise justify.

This Court should overrule *Booth* and acknowledge that a defendant may properly be viewed as morally culpable based on all additional harm that could have been reasonably anticipated by the defendant. In addition, the Court should further acknowledge that where the additional harm caused by a defendant's intentional choice to commit murder falls within the range of possible consequences inherent in human societal experience, then it can be fairly said that any reasonable person should have anticipated the additional harm. Certainly, evidence of such additional harm would serve to inform the sentencer about the defendant's moral culpability. In fact, such proof is highly relevant to the moral judgment which must be exercised by the jury in deciding what sentence to impose.

3. *Booth* and *Gathers* should be overruled because they fail to recognize the many ways that evidence of victim impact may be admitted in capital cases.

If this Court decides that evidence regarding harm to society and the victim's family is not relevant to personal responsibility and moral culpability, the Court's decision in *Booth* should still be overruled because it fails to acknowledge that there are many other ways in which such evidence may be admissible. This case presents a prime example of how victim impact testimony may be intertwined with testimony offered during the guilt

phase. The petitioner brutally murdered Charisse and her young daughter. He attempted to murder Nicholas Christopher. Miraculously, Nicholas survived the numerous stab wounds the petitioner inflicted upon him. There is no question but that Nicholas is a "direct" victim of the petitioner's violence. However, Nicholas is also a more "indirect" victim in that he continues to suffer today because he no longer has his mother or sister with him. Certainly, the jury was entitled to know, as it did, that Nicholas was present during the brutal slaying of his sister and his mother. Certainly the state was entitled in closing argument to remind the jury that and to argue that this circumstance of the crime was a factor in establishing that the petitioner's acts were heinous, atrocious, or cruel in that they involved depravity of mind. Yet, if those comments crossed the line into impermissible victim impact testimony, it is difficult to tell where that occurred.

A good example of victim impact testimony being mingled with the facts of the case is *People v. Clark*, 789 P.2d 127 (Cal. 1990). There, the murder was committed precisely because the defendant wanted the victim's wife to suffer because of her status and relationship to the defendant. The California Supreme Court found on the basis of *Booth* that this evidence should not have been admitted since it was impermissible victim impact testimony, although the court held that the error was harmless. *Id.* at 157-58. This Court has not said whether victim impact evidence that is properly admitted during the guilt phase may be relied upon in the sentencing phase of

a capital case or if it may be argued to the jury by the prosecutor.⁷

The blanket rule announced in *Booth* fails to acknowledge that often, as here, victim impact evidence will be introduced to the jury simply because it is intertwined with the facts establishing the circumstances of the crime. To allow victim impact evidence to be admitted during the guilt phase because it relates directly to the circumstances of the crime but to prevent references to it during the sentencing phase creates an anomaly. After all, the jury is charged with making a judgment regarding sentence based upon the nature and circumstances of the crime as well as the individual characteristics of the defendant. *Zant v. Stephens*, 462 U.S. at 879. In this case, the victim impact evidence about which the petitioner complains was entirely commingled with the proof of the crime and was therefore properly admitted.

Victim impact evidence may also be admissible, as the Court appeared to recognize in *Booth*, when admitted to "rebut an argument offered by the defendant," such as when the state wishes to establish the peaceable nature of the victim to rebut the defendant's claim that the victim was the aggressor. *Booth*, 482 U.S. at 507 n. 10, citing Fed. R. Evid. 404(a)(2).

⁷ In *Gathers*, the religious material found among the victim's belongings was admitted into evidence during the guilt phase. The Court ruled that the prosecutor impermissibly argued about the content of the material to the jury during his closing argument in the sentencing phase. However, the text of the material was not discussed during the guilt phase and it is unclear whether the Court would have found that the argument passed constitutional muster if the text had been presented fully to the jury prior to the sentencing stage.

C. Evidence regarding the victim's character may be relevant and does not always violate the Constitution.

A primary reason for the majority's ruling in *Booth* was the legitimate concern that "mini-trials" on the victim's worth would be permitted in capital cases. The Court was understandably concerned that juries not make a decision as to whether to impose life or death based upon a weighing of the relative worth of the victim's life against that of the defendant's. The respondent agrees that such a result should be avoided. However, the majority in *Booth* failed to acknowledge that not all character evidence rises to the level of a constitutional violation.

It is often the case that proof of some characteristics of the victim will be a part of the evidence which properly comes in during the guilt/innocence phase. For example, in this case, the fact that Charisse was the mother of two children, that she occasionally suffered from sinus headaches, that she was single and that she was a socially participating neighbor in the apartment complex all properly came in during the guilt/innocence phase. Similarly, evidence regarding the character of the victim may be admitted in order to rebut an argument advanced by a defendant that the victim was the aggressor. *Booth, supra*, 482 U.S. at 507 n. 10, citing Fed. R. Evid. 404(a)(2).

Evidence of a victim's characteristics may also be properly admitted where it is presented to the jury as a

part of the evidence of harm caused by the murder to society or the victim's family. As set out in Section A, such evidence is constitutionally permissible. In some cases, there may be information about the victim's characteristics commingled with the evidence of harm. Indeed, as Justice Scalia has observed, it is often impossible to tell which is which. *Gathers*, 490 U.S. at 823 (Scalia, J., dissenting).

Similarly, evidence about the characteristics of the victim may be admitted to prove an aggravating circumstance. Some aggravating circumstances are based solely on the status of the victim, such as the victim's occupation as peace officer, fireman, judge or prosecutor. Tenn. Code Ann. §39-2-203(i)(9). In fact, in this case, the jury found that Lacie's age was an aggravating factor since she was under twelve and the petitioner was over eighteen. Tenn. Code Ann. §39-2-203(i)(1). Of course, proof of Lacie's age was needed to establish this aggravating circumstance, and even the petitioner does not complain that such evidence was inadmissible.

Moreover, proof about the victim's characteristics should be admissible even where it is not intertwined with other admissible evidence in order to remind the jury that the victim was also a unique individual. A "thumbnail sketch of the victim's difficult childhood" in order to give the jury a "quick glimpse of the life the petitioner chose to extinguish" does not violate the constitution. *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, J., dissenting). The defendant is not constitutionally entitled to have his gross violation of a unique human life sanitized in a capital sentencing proceeding. To remove the ability of the state to paint even a minimal

picture of the "uniqueness of the life" the defendant has chosen to extinguish is to do just that.

In painting the thumbnail sketch, the state would, of course, be precluded from relying on those characteristics of the victim which would tend to suggest a decision on a constitutionally impermissible basis. These would include, at least, race, sex and religious preference. *See generally McCleskey v. Kemp*, 481 U.S. 279, 309 n. 30 (1987). Aside from these characteristics which have inherent constitutional limitations, other character evidence may be presented without violating the Constitution so long as it is presented in a manner that does not tend to shift the focus of the jury to a weighing of the relative worth of the defendant's life against that of the victim. This standard would address the concerns of the majority without going to the extreme of a blanket prohibition against victim characteristic evidence.

In this case, the characteristics of Charisse as a good mother whom Nicholas misses and Lacie as a playmate who is also missed is so blended with proof of the crime itself and with evidence of the harm suffered by Nicholas that it simply does not offend the Constitution. Moreover, the generalized statement by the prosecutor about the exemplary life led by Charisse clearly did not bring about the shift in focus which the Constitution would prohibit. A rule which narrowly addresses the potential problem while still providing an opportunity for the state to "humanize" the victim best serves the jury in making its informed moral decision in a manner preferable to the *per se* bar in *Booth*.

D. There is no constitutional requirement that there be an absolute bar on admission of the opinions of victims' families as to sentence.

The third and final type of victim impact information held unconstitutional in *Booth* was the expression of an opinion by the victim's family that the defendant should receive the death penalty. The respondent acknowledges that such testimony must be handled with extreme care. However, the Court in *Booth* incorrectly concluded that such opinions would *always* be constitutionally impermissible. Permitting a "secondary victim" of a murder case, that is, an immediate family member, from expressing their opinion as to sentence can serve an important purpose. Allowing an immediate family member to express such an opinion can help to make that "secondary" victim whole. Victims of violent crimes often experience feelings of lack of control and helplessness. Peterson and Seligman, *Learned Helplessness and Victimization*, J. Soc. Issues (No. 2) 103 (1983). Allowing the family of the victim to express their opinion, if they so wish, is a means by which family members may be able to ameliorate their feelings of lack of control and helplessness. Such a procedure would help to channelize the victim's need for retribution. *See Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring); *Tison v. Arizona*, 481 U.S. 137, 181 (1987) (Brennan, J., dissenting). Indeed, this Court has said that capital punishment is, in part, "an expression of society's outrage at particularly offensive conduct" and is "essential in an ordered society that asks its citizens to rely on legal process rather than self-help to vindicate their wrongs." *Gregg v. Georgia*, 428 U.S. at 183. Permitting the immediate family of the murder victim to express

their opinion would serve to reinforce to citizens that their reliance on the legal process is well founded.

Moreover, so long as the narrowing of the class of death eligible persons is not based upon a statutory aggravating circumstance relating to the wishes of the victim's family, there should be no constitutional bar to the jury's consideration of such an opinion at this stage. The defendant is already in the class of persons who are "death eligible" and there is no reason that one consideration at this stage could not be the wishes of the victim's family.

The Court in *Booth* should have recognized that there is no *constitutional* problem with the admission of such evidence so long as the manner and quantity of the evidence which is admitted does not tend to diminish the jury's sense of responsibility for making the life and death decision. Cf. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Additionally, it is doubtful that a juror would be surprised to hear that the victim's family wants the most severe penalty possible imposed since that is likely to be the conclusion that most persons would draw, even absent any testimony. Thus, it is doubtful that the expression of such an opinion would result in a juror imposing the death penalty when he otherwise would have declined to impose it.

In this case, despite petitioner's insistence to the contrary, no testimony was adduced as to the wishes of the victim's family for a particular sentence. The prosecutor never argued to the jury that any family member wanted the death sentence, but only reminded them that family members would be cognizant of their decision and

would look to the jury's verdict for an indication of whether justice was done.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer.

(A. 12).

At no time did the prosecutor say that Nicholas or any other family member recommended that a sentence of death be imposed. Reminding the jury that family members would look to the verdict and reach their own conclusion as to whether justice was done was legitimate prosecutorial argument. This rhetorical flourish did not constitute proof, such as was admitted in *Booth*, that particular family members wanted the defendant put to death. However, as a result of the broad language used by the Court in *Booth*, the petitioner contends that this argument violated the proscription against admitting opinion testimony.

Certainly the manner and amount of comment regarding Nicholas' "opinion" did not tend to diminish the jury's sense of responsibility for making the decision.⁸

⁸ Assuming that, as in this case, no *Caldwell*-type issue is presented, then the only remaining issue is whether the argument was so prejudicial that it violated due process by denying petitioner a fundamentally fair trial. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Darden v. Wainwright*, 477 U.S. 168 (1986). The argument advanced by the prosecutor certainly did not rise to such a level. Indeed, it was extremely mild compared to

(Continued on following page)

Rather, if anything, it merely emphasized to the jury that the sentence to be imposed was, in fact, their decision and a grave one at that.

E. The doctrine of *stare decisis* does not preclude overruling *Booth* and *Gathers*.

Stare decisis is the general rule in our system and serves important functions of stability and predictability. This Court is generally more willing to overrule prior law when the prior erroneous holding involves a constitutional principle. Such flexibility is warranted because legislative correction is impossible. In *United States v. Scott*, 437 U.S. 82 (1978), the Court overruled an opinion it had issued just three years earlier, *United States v. Jenkins*, 420 U.S. 358 (1975), because the Court was convinced that the prior holding was erroneous. Quoting Justice Brandeis, the Court said:

[I]n cases involving the Federal Constitution, where correction through legislative act is practically impossible, this Court has often overruled its earlier decisions, *Brunett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408, 52 S.Ct. 443, 448, 76 L.Ed. 815 (1932) (dissenting opinion).

(Continued from previous page)

the statements made by the prosecutor in *Darden*. *id.* at 179-83. In light of the mild nature of the remarks and the overwhelming evidence both of petitioner's guilt and suitability for the death penalty given the heinous nature of this crime, the argument is clearly not a sufficient basis for setting aside petitioner's death penalty under *Darden* or *Donnelly*.

United States v. Scott, 437 U.S. at 101. In addition, flexibility is warranted where, as here, a restrictive constitutional decision interferes with democratic self-governance. Justice Powell warned of the threat to the democratic processes in his dissent in *Furman*:

Nothing short of an amendment to the United States Constitution can reverse the Court's judgments. Meanwhile, all flexibility is foreclosed. The normal democratic process, as well as the opportunities for the several States to respond to the will of their people . . . is now shut off . . .

The sobering disadvantage of constitutional adjudication of this magnitude is the universality and permanence of the judgment. The enduring merit of legislative action is its responsiveness to the democratic process . . .

Furman, 408 U.S. at 462 (Powell, J., dissenting).

Specifically, the rules promulgated in *Booth* and *Gathers* should be overruled because, among other things, (a) they produce confusion in application; (b) they rest on a mistaken practical assessment of the need for a prophylactic rule broader than any legitimate constitutional command; and (c) they rest on principles that cannot fairly be reconciled with the Constitution or other decisions of this Court.

The lessons of experience suggest that these decisions are creating substantial confusion in application. *Gathers*, 490 U.S. at 805 (O'Connor, J., dissenting). As this case demonstrates, even knowing what is potentially constitutionally impermissible can be difficult where the allegedly unconstitutional testimony and argument is

commingled with the proof and circumstances of the crime.⁹

Additionally, courts are having great difficulty in knowing when the testimony may be otherwise admissible. See, e.g., *State v. Huertas*, 553 N.E.2d 1058 (Ohio 1990), cert. granted, ___ U.S. ___, 111 S.Ct. 39, dismissed as improvidently granted, ___ 111 S. Ct. 805 (1991) (death sentence reversed, holding that the defendant's actual knowledge of the victim's family was irrelevant and portions of the victim impact evidence inadmissible even though some of it came as a direct response to evidence offered in mitigation by the defendant); *People v. Clark*, *supra*. Moreover, many courts are relying on a harmless error analysis as an alternative basis for those decisions upholding the death sentence, perhaps signifying their confusion and uncertainty. E.g., *State v. Boyd*, 797 S.W.2d 589, 598 (Tenn. 1990) (comments did not focus on victim's characteristics and, if error, it was harmless in view of the

⁹ In addition to the testimony and argument over which the petitioner is aggrieved, there was testimony in the guilt phase by Joseph Zvolanek that when he last saw his grandchildren alive, they were playing on some swings and that his daughter suffered from chronic sinus headaches. (R., XI, 475-76). There was also proof that Nicholas was conscious when found, that he held a wet pack to his protruding intestines on the way to the hospital, (R., XVII, 744-83), and the prosecutor commented on this during closing argument in the sentencing phase. (A. 9). It is unclear whether this constitutes impermissible evidence, but if it does then the fact that defense counsel has never contended that this testimony and argument violates *Booth* and *Gathers* emphasizes the confusion present as a result of these cases.

overwhelming evidence of defendant's guilt); *People v. Kelly*, 800 P.2d 516, 538 (Cal. 1990) (while arguably inappropriate, remarks brief and mild and therefore harmless); *Byrne v. Butler*, 845 F.2d 501, 511 (5th Cir. 1988) (unlike *Booth*, comments of prosecutor were brief and cryptic and did not rise to the level of constitutional error).

The constitutional rule promulgated in *Booth* and *Gathers* rests on a mistaken practical assessment of the need for a prophylactic rule broader than any legitimate constitutional command. This Court expressed understandable concerns in *Booth* over the potential for abuse in the introduction of *some* types of victim impact evidence. However, no such abuse has occurred in this case. Moreover, the concerns expressed by the majority could be adequately addressed by the trial judge's weighing of the relevancy of the proffered evidence against the level of unfair prejudice it might cause, just as trial courts do regularly in all criminal cases, including capital cases or other limiting rules as suggested herein. In fact, the majority in *Booth* acknowledged the trial judge's authority and ability to make such decisions:

The trial judge, of course, continues to have the primary responsibility for deciding when this information is sufficiently relevant to some when legitimate consideration to be admissible, and when its probative value outweighs any prejudicial effect. c.f. Fed. Evid. 403.

Booth, 480 U.S. at 507 n.10. This approach to handling the concern that *some* victim impact testimony may be unfairly prejudicial is greatly preferable to the broad prophylactic rule adopted in *Booth* which removes an

entire class of relevant evidence from the jury's consideration. Adopting a more traditional approach to the admission of victim evidence is also more consistent with the Court's historic deference to state legislatures and courts on issues of substantive evidence. The decisions in *Booth* and *Gathers* depart from this Court's general commitment to leaving basic substantive policy choices regarding what factors warrant particular punishment to legislative choice. *Gore v. United States*, 357 U.S. 386, 393 (1958); *California v. Ramos*, 463 U.S. at 999. Such policy choices are at the heart of democracy. By preempting the substantive determination of whether this class of evidence should be barred in capital cases, *Booth* and *Gathers* "disservel [] principles of democratic self-governance." See *Garcia v. Metro. Transit Authority*, 469 U.S. 528, 547 (1987).

That *Booth* and *Gathers* rest on principles that cannot be fairly reconciled with other decisions of this Court is discussed *supra* in Argument I, Section B1.

In addition to the foregoing factors, as Justice Scalia has pointed out, the Court's willingness to bow to "the force of better reasoning", even when the erroneous holding is a recent precedent, is particularly important in capital cases which purport to reflect "an evolving standard of decency". *Gathers*, 49 U.S. at 824 (Scalia, J., dissenting); Cf. *Furman v. Georgia*, 408 U.S. at 330 (Marshall, J., concurring). Eighth Amendment law, as it has developed, looks primarily to the general practices and laws of states as an objective means of determining what is a "cruel and unusual" punishment. *Id.* If states abandon a practice to conform to an erroneous decision, that method would become unavailable, even though the reason for

the newfound abandonment might not be a general societal moral condemnation of the practice. The Court would then have to resort to less objective and hard to discern criteria to answer the Eighth Amendment question of whether the practice is in fact consistent with prevailing standards of decency. The Court could avoid putting itself in that difficult position by overruling the erroneous, confusion-producing, recent Eighth Amendment precedent of *Booth* and *Gathers*.

II. THE DEATH SENTENCE IN THIS CASE SHOULD BE UPHELD EVEN IF *BOOTH* AND *GATHERS* ARE NOT OVERRULED BECAUSE ANY VIOLATION OF THE PRINCIPLES OF *BOOTH* AND *GATHERS* IS HARMLESS BEYOND A REASONABLE DOUBT.

The Supreme Court of Tennessee found that the victim impact testimony of Mrs. Zvolanek and the prosecutor's arguments were relevant to establish the petitioner's personal responsibility and moral guilt. However, it found that assuming the evidence and argument violated the Eighth Amendment, it was harmless beyond a reasonable doubt, noting that:

[t]he "personal responsibility", the "moral guilt" and the "blame worthiness" of the person who committed these crimes, was established by the proof at the guilt phase, to-wit, that inhuman brutality, without reason or explanation was heaped upon three innocent human beings. Once that person's identity was established by the jury's verdict, the death penalty was the only rational punishment available.

State v. Payne, 791 S.W.2d at 19 (A. 43).

The record in this case fully supports the Tennessee Supreme Court's finding in this regard. Charisse Christopher sustained multiple wounds, representing at least forty-one knife thrusts. (R., XI, 481-86). Lacie Christopher suffered a total of nine wounds. Nicholas also suffered multiple stab wounds. (R., XI, 490-92; XIII, 811-16). The jury need only have considered the number of times the petitioner raised that butcher knife and brought it down into the bodies of his victims to comprehend the cruelty and the depravity of the crime committed. The petitioner's cruel and depraved acts established without question, as the Supreme Court of Tennessee found, that the death penalty is the only rational sentence that could have been given.

Finally, it is doubtful that it came as any surprise to a jury of twelve reasonable men and women that a small child would express concern about his mother and only sibling whom he saw brutally butchered to death before his eyes. This, along with the overwhelming proof, apart from any proof concerning the impact on Nicholas, of the petitioner's guilt and his suitability for the death penalty, renders any error in the admission of this proof and argument harmless beyond a reasonable doubt. *Satterwhite v. Texas*, 486 U.S. 249 (1988).

CONCLUSION

The judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

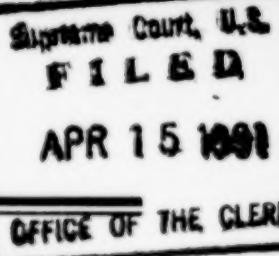
CHARLES W. BURSON
Attorney General & Reporter
State of Tennessee

KATHY M. PRINCIPAL
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-3487

Counsel for Respondent

No. 90-5721



IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PERVIS TYRONE PAYNE,
Petitioner,
v.

TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

PETITIONER'S REPLY BRIEF

J. BROOKE LATHRAM *
LES JONES
130 North Court Avenue
Memphis, Tennessee 38103
(901) 523-2311

* Counsel of record

Counsel for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
ARGUMENT	1
I. THE STATE ACKNOWLEDGES THAT THE CAPITAL SENTENCING DECISION MAY NOT BE BASED UPON A WEIGHING OF THE VICTIM'S LIFE AGAINST THAT OF THE DEFENDANT'S. YET, THE INEVITABLE RESULT OF OVERRULING <i>BOOTH</i> AND <i>GATHERS</i> WILL BE TO REQUIRE THE SENTENCER TO ENGAGE IN PRECISELY SUCH WEIGHING. THIS, IN TURN, MEANS THAT SOME LIVES WILL BE CONSIDERED WORTH MORE THAN OTHERS.....	1
II. THE STATE AND SOLICITOR GENERAL MISUNDERSTAND THE "FORESEEABILITY" CONCEPT. THE EIGHTH AMENDMENT DOES NOT PROHIBIT A PROSECUTOR FROM ASKING THE JURY TO ASSESS THE CRIME AND THOSE CONSEQUENCES THAT WERE FORESEEABLE TO THE DEFENDANT AT THE TIME HE COMMITTED THE CRIME	3
III. A LEGISLATURE, WHEN ACTING IN FURTHERANCE OF A LEGITIMATE GOVERNMENTAL INTEREST, MAY DEFINE A CLASS OF PERSONS THAT IS ENTITLED TO INCREASED PROTECTION OR A CATEGORY OF HARM THAT JUSTIFIES MORE SEVERE PUNISHMENT. IN THE CAPITAL SENTENCING CONTEXT, A LEGISLATURE MAY CLASSIFY AS DEATH ELIGIBLE THOSE OFFENDERS WHO MURDER A MEMBER OF THE PROTECTED CLASS OF PERSONS OR WHO CAUSE THE CATEGORY OF HARM DESIGNATED FOR SPECIAL CONDEMNATION. NEITHER A LEGISLATURE AT THE "NARROWING" STAGE, NOR A JURY AT THE SENTENCING STAGE,	

TABLE OF CONTENTS—Continued

	Page
MAY, HOWEVER, ENHANCE CAPITAL PUNISHMENT ON THE BASIS OF NON-SPECIFIC VICTIM CHARACTERISTICS OR IMPACTS	7
A. Legislatures may enhance punishment on the basis of the victim's status or the degree of harm caused by the proscribed conduct whenever the legislation furthers a legitimate governmental interest and avoids arbitrariness by specifically defining the class of persons to be protected or the category of harm to be condemned. Legislation that attempted to enhance punishment on the basis of non-specific victim characteristics or impacts would, however, be impermissibly arbitrary..	8
B. Inconsistency is inevitable in capital sentencing hearings. Such inconsistency is produced by variables (for example, differences in juror perspectives, variations in the relevant evidence, and the differing abilities of counsel) that are inherent in, and necessary to the operation of, individualized sentencing hearings. This does not mean, however, that the Eighth Amendment tolerates the introduction of other variables that are not necessary to the operation of such hearings. Non-specific victim characteristics and impacts are variables that cannot be constitutionally tolerated	12
IV. THE PROSECUTION'S APPEAL TO THE JURY TO IMPOSE DEATH IN ORDER TO SATISFY AN ANTICIPATED DESIRE BY NICHOLAS CHRISTOPHER FOR PAYNE'S EXECUTION VIOLATED THE EIGHTH AMENDMENT. THIS REQUIRES SETTING ASIDE PAYNE'S DEATH SENTENCE, EVEN IF THE COURT DECIDES TO OVERRULE GATHERS AND THAT PART OF	

TABLE OF CONTENTS—Continued

	Page
BOOTH WHICH DOES NOT DEAL WITH SURVIVORS' OPINIONS. FURTHERMORE, THOUGH IS IT NOT NECESSARY FOR THE COURT TO REACH THE ISSUE, THE PROSECUTION'S ARGUMENT WAS ALSO FUNDAMENTALLY UNFAIR AND THUS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT	16
V. THE FACT THAT THE PROSECUTION CALLED MRS. ZVOLANEK TO TESTIFY, EMPHASIZED THE CRIMES' EFFECTS ON NICHOLAS AND THE GRANDPARENTS', DRAMATICALLY PLEADED WITH THE JURY TO IMPOSE DEATH TO AVOID LETTING NICHOLAS DOWN, INVITED THE JURY TO WEIGH THE DEFENDANT'S LIFE AGAINST THAT OF THE VICTIMS, AND RESORTED TO UNETHICAL THEATRICS SHOWS THAT THE PROSECUTION BELIEVED THAT IT COULD NOT OBTAIN A DEATH VERDICT SOLELY ON THE EVIDENCE OF THE CRIMES AND THUS GRAPHICALLY DEMONSTRATES THAT THE USE OF <i>BOOTH</i> -CONDEMNED INFORMATION IN THIS CASE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT	20
CONCLUSION	

TABLE OF AUTHORITIES

CASES:	Page
<i>Booth v. Maryland</i> , 482 U.S. 496 (1987)	<i>passim</i>
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985)	18
<i>California v. Ramos</i> , 463 U.S. 992, 1000 (1983)	11, 13, 16, 18
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986)	18
<i>Donnelly v. De Christoforo</i> , 416 U.S. 637 (1947)	18
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	15
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980)	11
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	11, 12, 16
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	15
<i>Roberts v. Louisiana</i> , 431 U.S. 633 (1977)	9, 11
<i>South Carolina v. Gathers</i> , 490 U.S. 805 (1989)	<i>passim</i>
<i>Tennessee v. Payne</i> , 791 S.W.2d 10 (1990)	18, 20
<i>United States v. Murphy</i> , 30 M.J. 1040 (ACMR 1990)	3, 5
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	15
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	7, 8, 13
 STATUTE:	
49 U.S.C. app. § 1472(i)	9

PETITIONER'S REPLY BRIEF

ARGUMENT

I. THE STATE ACKNOWLEDGES THAT THE CAPITAL SENTENCING DECISION MAY NOT BE BASED UPON A WEIGHING OF THE WORTH OF THE VICTIM'S LIFE AGAINST THAT OF THE DEFENDANT'S. YET, THE INEVITABLE RESULT OF OVERRULING *BOOTH* AND *GATHERS* WILL BE TO REQUIRE THE SENTENCER TO ENGAGE IN PRECISELY SUCH WEIGHING. THIS, IN TURN, MEANS THAT SOME LIVES WILL BE CONSIDERED WORTH MORE THAN OTHERS.

The inevitable result of permitting a capital sentencing decision to be based upon the worth of the victim is that some lives will be considered worth more than others.¹ This is proven by the following syllogism:

1. The jury may consider the worth of the victim in deciding whether to impose the death penalty;
2. The greater the victim's worth, the more justified society is in executing the offender;
3. Therefore, the lives of some victims are worth more than others.

The State candidly acknowledges that a defendant's execution should not depend upon his victim's worth. The State thus writes: "The Court [in *Booth*] was understandably concerned that juries not make a decision as to whether to impose life or death based upon a weigh-

¹ We are aware that legislatures, in classifying offenders for death eligibility, often enhance punishment on the basis of the victim's status. These statutes do not, however, represent a legislative proclamation that some lives are worth more than others. They instead signify a legitimate governmental interest that is served by extending additional protection to the defined class of victims. See Part III, *infra*.

ing of the relative worth of the victim's life against that of the defendant's. *The respondent agrees that such a result should be avoided*" (Brief of Respondent at 36) (emphasis added). Later, the State says:

Aside from these characteristics which have inherent constitutional limitations [race, sex and religious preference], other character evidence may be presented without violating the Constitution *so long as it is presented in a manner that does not tend to shift the focus of the jury to weighing the relative worth of the defendant's life against that of the victim* (emphasis added).

Id. at 38.

In this case, the jury's focus was indeed shifted to a comparison of the defendant's life and the victims' worth:

[Petitioner's counsel]² says but [sic] Pervis Payne has lived an exemplary life for twenty years. Well, what about Charisse, for twenty-eight years? What about Lacie Jo, for two years? They lived exemplary lives. But they are not here with us any more. You have to weigh what has happened.

The State's insistence that this argument "did not bring about the shift in focus which the Constitution would prohibit" (Brief of Respondent at 38) amazingly ignores what the prosecutor was plainly asking the jury to do. Having previously conceded the unconstitutionality of the very weighing process in which Payne's jury was asked to engage, the State understandably would like to place a different gloss on the prosecution's argument. The proof, however, is in the pudding.

² Payne was not represented by the undersigned at trial or on his appeal to the Tennessee Supreme Court.

II. THE STATE AND SOLICITOR GENERAL MISUNDERSTAND THE "FORESEEABILITY" CONCEPT. THE EIGHTH AMENDMENT DOES NOT PROHIBIT A PROSECUTOR FROM ASKING THE JURY TO ASSESS THE CRIME AND THOSE CONSEQUENCES THAT WERE FORESEEABLE TO THE DEFENDANT AT THE TIME HE COMMITTED THE CRIME.

In our first brief, we explained that the jury's focus must be on the consequences foreseeable to the offender at the time he committed the crime (Brief of Petitioner at 12-13). See *Booth v. Maryland*, 482 U.S. 496, 505 (1987). To the extent permitted by the record, the prosecution may ask the jury to step into the defendant's shoes at the time he committed the offense and consider the consequences that the offender should have then appreciated. See, e.g., *United States v. Murphy*, 30 M.J. 1040 (ACMR 1990).³ Such an argument properly focuses on the offender's state of mind and, hence, his moral culpability.

An offender's moral culpability is, however, not revealed by events that actually occur subsequent to the commission of the crime. This is so even if those events happen to fall within the range of consequences foreseeable at the time he committed the offense. By the same token, though, since the law's concern is properly with the offender's state of mind at the time he committed the crime, the mere fact that the foreseeable consequences

³ *Murphy*, cited by the Solicitor General (*amicus* Brief of United States at 3 n.2), illustrates a constitutionally permissible use of victim impact information. The defendant in that case murdered his ex-wife, her child and his own child by his ex-wife. Evidence of the ex-wife's character was properly admitted at the sentencing hearing to rebut the defendant's claim that he was afraid she would not take proper care of his son and to show that the defendant was aware of the value of the life he was extinguishing. *Id.* at 1062. The Court correctly held that *Booth* permitted the sentencer to assess the crime and its consequences "through the eyes of the murderer." *Id.*

did not in fact subsequently occur does not render those foreseeable consequences irrelevant.

An understanding that the jury's focus must be on the consequences foreseeable to the offender when he committed the crime will better enable us to analyze the evidence and arguments used by the prosecution in this case. More specifically, it will help us distinguish those references to the crimes' consequences that were proper from those that were improper.

In its rebuttal argument at the sentencing trial, the prosecution referred to the fact that Lacie Jo would never be able to go to a high school prom (J.A. 14). This, of course, is a constitutionally permissible argument. The perpetrator of these crimes knew that he was killing a little girl who would forever miss the opportunity to grow up, to go through the trials and tribulations of adolescence, and to participate in such events as high school proms.⁴ Furthermore, as we pointed out in our first brief,⁵ the Eighth Amendment would not have prohibited the prosecution from arguing that the perpetrator knew that, if a child by chance survived the attack, as Nicholas did, that child would miss his mother and his sister.

There is, however, a marked distinction between making these arguments and proving the events that actually occurred subsequent to Charisse's and Lacie Jo's deaths. The former properly invited the jury to assess the offense and its foreseeable consequences through the defendant's

⁴ Similarly, in a case involving the knowing murder of a minister, the prosecution would not be forbidden by the Eighth Amendment from arguing that the defendant knew that he was killing someone who ministered to those in spiritual need. The prosecution would, however, be prohibited from calling a witness who, unbeknownst to the defendant, had been helped by the minister through a particular crisis and would have consulted with the minister in the future if he had remained alive.

⁵ Brief of Petitioner at 12-13.

eyes. See *United States v. Murphy*, 30 M.J. at 1062. The latter, however, asked the jury to step forward in time to see what had actually occurred following the commission of the offenses. When this was done, the jury was no longer being asked to assess the crimes and their foreseeable consequences from the defendant's vantage point, but was instead being asked to weigh the defendant's life against the harm that occurred subsequent to the crimes. The focus was no longer on whether the defendant's conduct and character warranted the imposition of the death penalty, but on whether the magnitude of the survivors' grief merited the defendant's execution.

What makes Mrs. Zvolanek's testimony (J.A. 3) irrelevant is the purpose for which it was offered. After-the-fact occurrences are not evidence of those consequences that were appreciable to the offender at the time of the crime. As the State recognizes, Mrs. Zvolanek's testimony was instead offered to show the harm that actually occurred following the commission of these crimes (Brief of Respondent at 23).⁶ In the State's view, the testimony was relevant because, "[t]he greater the harm, the more worthy the individual is of blame and the greater the penalty society may demand." *Id.*

That the State's position is indefensible is revealed by posing the converse of the above-quoted statement. We doubt that the State really believes that, when the harm occurring subsequent to the crime is not as substantial as might otherwise have been expected, the offender is somehow less worthy of blame and that society is less entitled to a severe punishment. If, for example, Nicholas had been better able to adjust to the tragic loss of his mother and sister than one could reasonably have anticipated, would these crimes have been less heinous? Surely not. Nor, in such event, would the prosecution

⁶ We must not overlook the fact that Mrs. Zvolanek's testimony not only depicted the crimes' subsequent effect on Nicholas, but also revealed her own grief as well. In its arguments, the prosecution referred to the grandparents' grief (J.A. 12, 15).

have been precluded from arguing that the perpetrator knew, when he killed Charisse and Lacie Jo, that the little boy was likely to experience severe emotional problems. The purely fortuitous event that the little boy had not experienced such problems would in no way have diminished the offender's culpability.

In addition to incorrectly arguing that the after-the-fact events demonstrated the defendant's moral blameworthiness, the State further contends that Mrs. Zvolanek's testimony was relevant to rebut mitigating testimony by Payne's girlfriend that Payne loved, and was himself loved and missed by, her children (Brief of Respondent at 26). In the State's view, Mrs. Zvolanek's testimony "directly paralleled" that of Payne's girlfriend. *Id.*

The State thus, once again, advocates weighing an offender's life against the after-the-fact harm occasioned by the victim's loss. It is ironic that the State takes this position in view of the fact that, as we just observed in Part I, the State candidly acknowledges the constitutional impropriety of weighing the victim's worth against the defendant's life. *Id.* at 36, 38. As Justice Scalia has pointed out, it is difficult to divorce a victim's admirable personal characteristics from the particular injury caused to the victim's family and fellow citizens. *South Carolina v. Gathers*, 490 U.S. 805, 823 (1989) (Scalia, J., dissenting). It is, therefore, illogical for the State to correctly acknowledge the unconstitutionality of weighing an offender's life against the victim's worth while simultaneously advocating weighing his life against the after-the-fact impact of the crime.

The degree to which a prosecutor will be able to refer to the foreseeable consequences of the crime, as well as to the victim's characteristics, will, of course, depend on the extent to which the record in any given case permits it. We conclude this discussion by offering a jury instruction that would, in our view, satisfy the Eighth Amendment:

Members of the jury, you have heard testimony about the victim's characteristics. You have also heard arguments about the consequences that the defendant may have been in a position to foresee at the time he committed the offense. In considering this testimony and these arguments, you are not to weigh the defendant's life against the worth of the victim's life or against the actual impact of the crime. You are instead to consider the victim's characteristics and the consequences of the crime solely through the eyes of the defendant at the time he committed the crime. You may consider those matters within your common experience that would have been foreseen by the defendant as possible consequences of his crime. You must then decide the extent to which, if at all, the defendant's personal guilt for these crimes is shown by his knowledge of the victim's characteristics and his awareness of the crime's possible consequences.

III. A LEGISLATURE, WHEN ACTING IN FURTHERANCE OF A LEGITIMATE GOVERNMENTAL INTEREST, MAY DEFINE A CLASS OF PERSONS THAT IS ENTITLED TO INCREASED PROTECTION OR A CATEGORY OF HARM THAT JUSTIFIES MORE SEVERE PUNISHMENT. IN THE CAPITAL SENTENCING CONTEXT, A LEGISLATURE MAY CLASSIFY AS DEATH ELIGIBLE THOSE OFFENDERS WHO MURDER A MEMBER OF THE PROTECTED CLASS OF PERSONS OR WHO CAUSE THE CATEGORY OF HARM DESIGNATED FOR SPECIAL CONDEMNATION. NEITHER A LEGISLATURE AT THE "NARROWING"⁷ STAGE, NOR A JURY AT THE SENTENCING STAGE, MAY, HOWEVER, ENHANCE CAPITAL PUNISHMENT ON THE BASIS OF NON-SPECIFIC VICTIM CHARACTERISTICS OR IMPACTS.

Legislatures often enhance punishment on the basis of the victim's status or the degree of harm caused by the proscribed conduct. It does not follow from this, however,

⁷ See *Zant v. Stephens*, 462 U.S. 862, 870-73 (1983).

that a capital sentencing jury may permissibly enhance punishment on the basis of non-specific victim characteristics or impacts. We demonstrate this in two steps. In Section A, we discuss the circumstances under which legislatures, when classifying offenders for death eligibility, may constitutionally enhance punishment on the basis of the victim's status or the degree of harm caused by the proscribed conduct. We further explain in Section A that a legislature could not, even if it desired to do so, enact a statute making death eligibility dependent upon non-specific victim characteristics or impacts. In Section B, we show that a sentencing jury, like a legislature, is also constitutionally prohibited from imposing death on the basis of such factors.

A. Legislatures may enhance punishment on the basis of the victim's status or the degree of harm caused by the proscribed conduct whenever the legislation furthers a legitimate governmental interest and avoids arbitrariness by specifically defining the class of persons to be protected or the category of harm to be condemned. Legislation that attempted to enhance punishment on the basis of non-specific victim characteristics or impacts would, however, be impermissibly arbitrary.

The Eighth Amendment does not prohibit a state legislature or Congress from making death eligibility dependent upon the status of the victim, provided that there is a legitimate governmental interest in imposing a more substantial punishment for the murder of such victims than for the murder of others. *Zant v. Stephens*, 462 U.S. at 877. *Booth* and *Gathers* certainly do not say or indicate otherwise. Similarly, *Booth* and *Gathers* do not prohibit a state legislature or Congress from making death eligibility dependent upon the degree of harm caused by the proscribed conduct, provided, again, that there is a legitimate governmental interest in punishing those re-

sponsible for that harm more severely than those who are responsible for other types of harm.⁸ *Id.*

Punishment enhancement must serve a legitimate governmental interest and avoid arbitrariness. Two examples illustrate the manner in which a legislature may further a legitimate governmental interest in a non-arbitrary fashion.

A society, acting through its elected representatives, may punish the murderer of a peace officer even if the offender is unaware of his victim's employment status at the time of the crime. *See Roberts v. Louisiana*, 431 U.S. 633, 636 (1977). Society's interests in deterrence and retribution justify the enhanced punishment of such offenders. Deterrence is served, because a potential offender will realize that the consequences are more serious when the victim he kills happens to be a peace officer. Retribution is satisfied by the legislative finding that peace officers serve a special societal need and that murdering them constitutes an especially grievous affront to society. Arbitrariness is avoided, because the legislature has defined with particularity the class of persons receiving the additional protection.

Similarly, Congress may designate for death eligibility a participant in an air hijacking that results in death, even though the offender did not himself directly cause or intend the death. 49 U.S.C. app. § 1472(i). Again, the law enforcement objectives of deterrence and retribution are served. Congress may rationally decide that the increased penalty will deter dangerous conduct, and, additionally, it is justified in finding that society regards

⁸ In trials involving such statutes, *Booth* and *Gathers* simply mandate that the sentencing jury, after first determining that the defendant fits into the death eligible category, be precluded from deciding the defendant's fate by weighing his life against either the worth of his victim or the actual impact of the offense. The mere fact that the jury may be required to consider the victim's status or the crime's consequences in order first to find the existence of the requisite aggravating factor creates no Eighth Amendment problems.

deaths resulting from highjacking as an especially egregious affront. Arbitrariness is avoided because Congress has specifically identified the particular category of harm that is to receive special condemnation.

Penalty enhancement based upon a specifically defined class of victims or category of harm is hardly unique to capital punishment determinations. For example, all states, as far as we know, allow a more severe punishment to be imposed upon the driver who runs a stop sign and kills another person than upon the driver who runs the same stop sign but, fortuitously, injures no one.

This punishment enhancement, like those for the murderer of a peace officer and the participant in a highjacking that results in death, promotes deterrence and retribution and avoids arbitrariness. Deterrence is promoted, because drivers will be more careful if they are aware of the severe punishment that can result if, by chance, they kill someone when they run a stop sign. Retribution is demonstrated by society's belief that a traffic violation resulting in death is a more serious affront than such a violation without injury. Arbitrariness is avoided, because the state has specifically defined the category of harm (death resulting from running a stop sign) designated for heightened condemnation.

The Solicitor General's suggestion that a legislature may enhance the punishment of those who murder the parents of minor children (*amicus* Brief of United States at 16) further illustrates our point. The Solicitor General may well be correct. The Constitution permits legislatures very wide leeway to make death eligible those who kill a member of a specifically defined class of victims or participate in specifically defined types of activity that result in death. As long as there is a rational basis for the legislative finding of governmental interest and as long as the designated class of victims or category of harm is specifically defined, there is no constitutional violation. While reasonable people can debate the merits of

particular classifications and can disagree over whether such classifications really promote deterrence or retribution, such debates must, with very rare exceptions, be resolved by the citizens' democratically elected representatives.⁹ See *Gregg v. Georgia*, 428 U.S. 153, 192 (1976); *California v. Ramos*, 463 U.S. 992, 1000 (1983).

The problem in this case is that Payne's punishment was enhanced on the basis of victim characteristics and impacts that have not been legislatively defined and that, indeed, are incapable of precise legislative definition. A reference to the peace officer, highjacking and traffic violation examples just discussed will demonstrate that no legislature could enact a statute that enhances punishment on the basis of the factors that the jury considered in imposing Payne's death sentence.

In none of these three examples has the legislature enhanced punishment on the basis of non-specific victim characteristics or impacts. The Louisiana legislature, for example, did not make a punishment distinction between the murder of a peace officer who had led an "exemplary life" and one who had not, or between the murder of a peace officer who left "especially aggrieved survivors" and the murder of one who left either no, or less aggrieved, survivors. See *Roberts v. Louisiana*, 431 U.S. at 636. Nor did Congress and the state legislature, respectively, make similar differences among victim characteristics or impacts the basis for punishment distinctions between different death eligible highjackers or between different death-causing traffic violators.

That these legislative bodies are constitutionally prohibited from making such punishment distinctions is obvious. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Making

⁹ Indeed, if this nation's citizens better appreciated just how much discretion their elected representatives have in making decisions of this type, they might compel their representatives to make these hard choices and to cease "handing off" this obligation to the courts and administrative agencies.

the severity of the penalty dependent upon whether the victim led an "exemplary life," for example, or upon whether the crime caused "profound grief," would create such arbitrary results that neither deterrence nor retribution would be served. Potential offenders would have no basis for knowing when their conduct would be treated more severely. Nor could society derive any retributive satisfaction since the affronts designated for more severe punishment would be too vaguely defined to inform society of those particular affronts that would receive the increased penalty.

Notwithstanding the arbitrariness attendant to any legislative attempt to enhance punishment on the basis of such non-specific factors, both the State and Solicitor General contend that a jury, at the sentencing stage, may impose death because the victim led an exemplary life or because his survivors experienced profound grief (Brief of Respondent at 21-22; *amicus* Brief of United States at 16-17). As we shall now explain, they are wrong.

B. Inconsistency is inevitable in capital sentencing hearings. Such inconsistency is produced by variables (for example, differences in juror perspectives, variations in the relevant evidence, and the differing abilities of counsel) that are inherent in, and necessary to the operation of, individualized sentencing hearings. This does not mean, however, that the Eighth Amendment tolerates the introduction of other variables that are not necessary to the operation of such hearings. Non-specific victim characteristics and impacts are variables that cannot be constitutionally tolerated.

Uniformity among the sentences of death eligible offenders is impossible to achieve. Such uniformity can never occur as long as juries are given the substantial discretion that the Eighth Amendment requires. Cf. *Gregg v. Georgia*, 428 U.S. at 220-26 (White, J., concurring). Two different juries might view the same evidence and reach opposite conclusions. Moreover, varia-

tions in the proof, as well as the differing abilities of the lawyers, make it difficult to distinguish in any meaningful fashion those cases in which death is imposed from those in which it is not. See *Booth v. Maryland*, 482 U.S. at 517-18 (White, J., dissenting). Inconsistency among the sentences of death eligible offenders is, therefore, an inevitable by-product of a system that affords substantial discretion to juries. This inevitable inconsistency is not unconstitutional, since the variables creating it must necessarily be present if juries are to be given the discretion required by the Eighth Amendment.

This does not mean, however, that the Constitution tolerates the introduction of *any* arbitrary factor at the selection stage. Sentencing decisions could not stand if, for example, they were based on considerations of such impermissible factors as race, religion, or political affiliation. *Zant v. Stephens*, 462 U.S. at 885. Similarly, the Constitution also prohibits sentencing juries from considering other factors that unnecessarily produce arbitrary and capricious sentencing patterns. See *California v. Ramos*, 463 U.S. at 999-1000 (pointing out that, though the Court must generally defer to the states on the substantive factors that may be laid before the jury, "[i]t would be erroneous to suggest, however, that the Court has imposed no substantive limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate").

The mere fact, therefore, that some inconsistency is inevitable in capital sentencing hearings does not permit the introduction of any and all arbitrary variables in such hearings. When a factor producing inconsistent results is a necessary part of the sentencing determination, its use is constitutionally permissible. When, however, the factor producing an inconsistency is not necessary to the operation of capital sentencing hearings, it cannot be tolerated.

The issue that must be decided here, therefore, is whether non-specific victim characteristics or impacts con-

stitute variables that are necessary to the operation of capital sentencing hearings. If so, their introduction into the sentencing process is constitutionally permissible, just as is the introduction of such other variables as differing juror perspectives and differences among lawyers.

One possible basis for allowing the use of these variables that may be eliminated out of hand is their relevance to prove an offender's state of mind, character, or propensity for future dangerousness. Differences in the backgrounds, records, mental health, and personality traits of death eligible offenders guarantee that the offenders will be treated differently. The same is, of course, true for variations in their mental states and *modus operandi* at the time they committed their crimes. This possible basis for allowing the use of these variables must be eliminated, however, because victim characteristics not known to the defendant and after-the-fact consequences are indisputably irrelevant to prove an offender's state of mind, character, or propensity for future dangerousness. We do not understand the State or Solicitor General to contend otherwise.

A second possible basis for allowing juries to base their decisions on non-specific victim characteristics and impacts that can also be quickly eliminated is the claimed relevance of these variables to rebut the offender's mitigating evidence. The use of these variables in this fashion requires the jury to weigh the defendant's life against the victim's worth¹⁰ and against the impact of the crime.¹¹ As the State has candidly acknowledged, at least in the case of victim worth (Brief of Respondent at 36, 38),¹² such weighing impermissibly shifts the jury's focus from a decision on whether the defendant should live or die to

a comparison of the respective lives of the defendant and the victim.¹³

The third and final possible basis for introducing non-specific victim characteristics and impacts into the capital sentencing determination is the claimed relevance of these variables to retribution. This basis must, however, also be rejected, because allowing sentencing juries to impose death on the basis of non-specific victim characteristics and impacts will not serve society's interest in retribution.

Retribution signifies society's desire that certain affronts be designated for punishment. It is axiomatic that, before society can express its desire that certain affronts be punished, it must first define those affronts. A punishment, in order to be a valid exercise of retribution, must follow the command that authorized retribution in the first instance. In the absence of a meaningfully defined affront, there is no way to determine if a particular offender's punishment is in accord with society's desire for retribution.

Punishment enhancements based on victim worth or impact would, in the absence of definable classes of protected persons or definable categories of condemned harm, inevitably be beset with uncertainty about whether the enhanced punishment was being correctly meted out in response to the interests society sought to protect. Unanswerable questions would be raised: Are the desired groups of people being protected? Are the harms that society wishes to condemn the ones that are, in fact, being most severely punished?

Retribution, therefore, must be invoked in the first instance at the narrowing stage, when the legislature defines the classes of victims it wishes to protect or the categories of harm it desires to condemn. The role of the

¹⁰ See *supra*, Part I.

¹¹ See *supra*, Part II.

¹² See *supra*, Part I.

¹³ In *Woodson, Lockett, Eddings*, and subsequent cases, there was no indication that a death eligible offender, having offered mitigating evidence bearing on his uniqueness as an individual in an effort to avoid execution, would enjoy a better chance if his victim happened, by chance, to have led a less than exemplary life or to have been someone who left behind no grief-stricken survivors.

sentencing jury must be limited to implementing retribution by deciding whether a particular death eligible offender should be executed.

Here, as we just explained in Section A, the legislature could not define the affronts (i.e., the murder of persons who led “exemplary lives” and murder causing “profound grief”) that the jury considered in imposing Payne’s death sentence. Because the variables on which Payne’s sentence was based are too vague to support a legislative classification of death eligibility and because those variables are not necessary to the operation of capital sentencing hearings, Payne’s sentence was necessarily the result of the kind of “excessively vague sentencing standards . . . condemned in Furman.” See *California v. Ramos*, 463 U.S. at 1000 (citing *Gregg v. Georgia*, 428 U.S. at 195 n.46).

Because non-specific victim characteristics and impacts are variables that are not necessary to the operation of a capital sentencing hearing, their introduction produces arbitrary punishment distinctions that cannot be constitutionally tolerated.

IV. THE PROSECUTION’S APPEAL TO THE JURY TO IMPOSE DEATH IN ORDER TO SATISFY AN ANTICIPATED DESIRE BY NICHOLAS CHRISTOPHER FOR PAYNE’S EXECUTION VIOLATED THE EIGHTH AMENDMENT. THIS REQUIRES SETTING ASIDE PAYNE’S DEATH SENTENCE, EVEN IF THE COURT DECIDES TO OVERRULE *GATHERS* AND THAT PART OF *BOOTH* WHICH DOES NOT DEAL WITH SURVIVORS’ OPINIONS. FURTHERMORE, THOUGH IT IS NOT NECESSARY FOR THE COURT TO REACH THE ISSUE, THE PROSECUTION’S ARGUMENT WAS ALSO FUNDAMENTALLY UNFAIR AND THUS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The State, in responding to this particular point, omitted the first and most important sentence in the concluding remarks of the prosecution’s initial closing argu-

ment (Brief of Respondent at 40-41). The omitted remark reads: “But there is something you can do for Nicholas” (J.A. 12). By omitting this key statement, the State was able to avoid portraying the prosecution’s argument for what it really was: An emotional plea to sentence Payne to death to avoid letting Nicholas down.

The government’s insistence that the prosecution’s argument is not governed by *Booth* (*amicus* Brief of United States at 26 n.15) completely ignores the fact that the prosecution, acting as Nicholas’ surrogate, eloquently expressed the anticipated desire of Nicholas for Payne’s execution. It also ignores the fact that the prosecution told the jury that this would be a compelling reason for imposing the death penalty. *Booth* surely condemns such an argument every bit as much as it condemns survivors’ opinion testimony.

The prosecution’s emotional appeal was, in actuality, more prejudicial in its effect than similar opinion testimony by Mrs. Zvolanek would have been. Such testimony, while it would have been highly prejudicial and violative of the Eighth Amendment, *Booth*, 482 U.S. at 508-09, would not, in all likelihood, have differed from the jurors’ expectations concerning Mrs. Zvolanek’s feelings. Here, however, the jurors were expressly told by the State’s representative that satisfaction of a victim was a permissible reason to impose death—satisfaction of a victim, it is important to note, for whom the jury understandably already felt great sympathy. Not only did the prosecution tell the jury it could sentence Payne to death “for Nicholas’ sake,” it also made the jurors feel that they would be letting Nicholas down if they returned a different verdict.

We know of no opinion in which this Court has even intimated, much less held, that satisfaction of a victim’s survivor is a permissible reason for imposing the death penalty. Indeed, the Court has gone to great lengths to eliminate, to the extent humanly possible, any risk that

the sentencing jury will decide a defendant's fate on the basis of reasons not properly bearing on whether he should live or die. See *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *California v. Ramos*, 463 U.S. at 998-99 (pointing out that the procedure in capital sentencing trials must be scrutinized to ensure that the death penalty is not meted out in an arbitrary and capricious manner). Because of the risk that Payne's sentence was based on a constitutionally invalid reason for imposing the death penalty, his death sentence must be set aside.

Though it is not necessary that the Court reach the issue, the prosecution's argument also violated the "fundamental fairness" test set forth in *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Donnelly v. De Christoforo*, 416 U.S. 637 (1974). The argument in this case was not simply an expression of prosecutorial zeal made during the "heat of battle." It was instead a calculated attempt to obtain from the jury an emotional decision grounded on a reason that cannot properly be the basis of a death sentence. It was hardly a coincidence that the prosecution chose to conclude both its initial closing argument (J.A. 12) and its rebuttal (J.A. 17) with improper appeals to the jury's emotion. (At the conclusion of its rebuttal argument, the prosecutor picked up the murder weapon and stabbed a diagram of Nicholas that had been marked as a trial exhibit, *Tennessee v. Payne*, 791 S.W.2d at 20 (J.A. 45).) Because of the prosecution's deliberate efforts to overcome reason with emotion, as well as the prejudicial effect of the prosecution's argument, that argument must be considered fundamentally unfair.

V. THE FACT THAT THE PROSECUTION CALLED MRS. ZVOLANEK TO TESTIFY, EMPHASIZED THE CRIMES' EFFECTS ON NICHOLAS AND THE GRANDPARENTS, DRAMATICALLY PLEADED WITH THE JURY TO IMPOSE DEATH TO AVOID LETTING NICHOLAS DOWN, INVITED THE JURY TO WEIGH THE DEFENDANT'S LIFE AGAINST THAT OF THE VICTIMS, AND RESORTED TO UNETHICAL THEATRICS SHOWS THAT THE PROSECUTION BELIEVED THAT IT COULD NOT OBTAIN A DEATH VERDICT SOLELY ON THE EVIDENCE OF THE CRIMES AND THUS GRAPHICALLY DEMONSTRATES THAT THE USE OF BOOTH-CONDEMNED INFORMATION IN THIS CASE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The State must not be permitted to go to great lengths to inject prejudice into the trial and subsequently, on appeal, disclaim its efforts by proclaiming that its unconstitutional conduct was, in hindsight, ineffective.

Except for the custodian of the video tape, Mrs. Zvolanek was the prosecution's only witness during the sentencing trial. If her testimony was really harmless beyond a reasonable doubt, why did the prosecution call her to testify (J.A. 2-3)? Why did the prosecution tell the jury in its opening statement during the sentencing phase that she would be called to describe the crimes' effects on Nicholas (J.A. 5)? Why did the prosecution solicit the jury to weigh Payne's life against the after-the-fact consequences that befell Nicholas and the grandparents (J.A. 15-16)? Why did the prosecution also ask the jury to weigh Payne's life against the character of the victims (J.A. 17)?

If the prosecution's appeal to the jury to impose death in satisfaction of an anticipated desire by Nicholas for Payne's execution was harmless beyond a reasonable doubt, why did the prosecution choose to make this dramatic appeal at the conclusion of its initial closing argu-

ment (J.A. 12)? Why, in its very last remarks to the jury, did the prosecution resort to grossly unethical behavior (J.A. 17) (*State v. Payne*, 791 S.W.2d 10, 20) (J.A. 45)?

The answers to these questions are simple. The prosecution knew that, though these crimes were brutal and shocking, all of the other evidence in the case mitigated in favor of sparing Payne's life. Fearing that the jury might temper with mercy its outrage at the horrible results of five uncharacteristic minutes in Payne's life, the prosecution used *Booth*-condemned evidence and arguments to ensure that Payne would not carry his burden of proving that the mitigating evidence outweighed the aggravating factors.

CONCLUSION

For the reasons stated herein and in our first brief, Petitioner respectfully submits that the Court's decisions in *Booth* and *Gathers* should not be overruled; that the Court should determine that the State's reliance upon *Booth*-condemned evidence and arguments violated Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution; that Petitioner's death sentence should be set aside; and that this case should be remanded for proceedings not inconsistent with the Court's judgment.

Respectfully submitted,

J. BROOKE LATHRAM *
LES JONES
130 North Court Avenue
Memphis, Tennessee 38103
(901) 523-2311

* Counsel of Record

Counsel for Petitioner

Supreme Court of the United States
FILED
APR 8 1991
OFFICE OF THE CLERK

No. 90-5721

(8)

In the Supreme Court of the United States

OCTOBER TERM, 1990

PERVIS TYRONE PAYNE, PETITIONER

v.

STATE OF TENNESSEE

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the use of victim impact evidence during the sentencing phase of petitioner's capital trial violated petitioner's rights under the Eighth Amendment.
2. Whether *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), should be overruled.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Summary of argument	7
Argument:	
I. The Eighth Amendment does not prohibit the admission of victim impact evidence at the sentencing phase of a capital trial	9
II. Principles of <i>stare decisis</i> do not require continued adherence to <i>Booth</i> and <i>Gathers</i>	23
III. The victim impact evidence and argument at issue in this case did not violate petitioner's rights under the Eighth Amendment	25
Conclusion	27

TABLE OF AUTHORITIES

Cases:

<i>Barclay v. Florida</i> , 463 U.S. 939 (1983)	17
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	19
<i>Beck v. Alabama</i> , 447 U.S. 625 (1980)	21
<i>Booth v. Maryland</i> , 482 U.S. 496 (1987) 6, 7, 9, 10, 12,	
	17-18, 20
<i>Burnet v. Coronado Oil & Gas Co.</i> , 285 U.S. 393 (1932)	23
<i>California v. Ramos</i> , 463 U.S. 992 (1983)	12, 14, 15
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	13
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986)	21, 26
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	17, 22
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	13
<i>Erie R.R. v. Tompkins</i> , 304 U.S. 64 (1938)	23
<i>Garcia v. San Antonio Metro. Transit Auth.</i> , 469 U.S. 528 (1985)	23
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977)	19
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980)	17
<i>Gore v. United States</i> , 357 U.S. 386 (1958)	25
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	15, 19

Cases—Continued:	Page
<i>Helvering v. Hallock</i> , 309 U.S. 106 (1940)	23
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	22
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	16, 20
<i>Mills v. Maryland</i> , 486 U.S. 367 (1988)	24
<i>Monell v. Department of Social Services</i> , 436 U.S. 658 (1978)	23
<i>Roberts v. Louisiana</i> , 431 U.S. 633 (1977)	16, 24
<i>Skipper v. South Carolina</i> , 476 U.S. 1 (1986)	15, 19, 22
<i>Snyder v. Massachusetts</i> , 291 U.S. 97 (1934)	22
<i>Solorio v. United States</i> , 483 U.S. 435 (1987)	23
<i>South Carolina v. Gathers</i> , 490 U.S. 805 (1989)	6, 9, 10, 13, 17-18, 24
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984)	15
<i>Stanford v. Kentucky</i> , 109 S. Ct. 2969 (1989)	12
<i>Tison v. Arizona</i> , 481 U.S. 137 (1987)	13
<i>United States v. Grayson</i> , 438 U.S. 41 (1978)	19
<i>United States v. Murphy</i> , 30 M.J. 1040 (A.C.M.R. 1990)	2
<i>United States v. Tucker</i> , 404 U.S. 443 (1972)	19
<i>Vasquez v. Hillery</i> , 474 U.S. 254 (1986)	23
<i>Williams v. New York</i> , 337 U.S. 241 (1949)	19
<i>Witherspoon v. Illinois</i> , 391 U.S. 510 (1968)	23
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	8
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	15, 16, 17
 Constitution, statutes, regulations, and rules:	
U.S. Const.:	
Amend. VIII	6, 7, 9, 12, 14, 18, 21, 26, 27
Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, 102 Stat. 4312:	
21 U.S.C. 848(h)(1)(B)	2
21 U.S.C. 848(n)	2
21 U.S.C. 848(n)(9)	2, 24
Air Piracy Act, 49 U.S.C. App. 1471 <i>et seq.</i> :	
49 U.S.C. App. 1472-1473	2
Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248:	
§ 2(b)(1), 96 Stat. 1248-1249	1
§ 3, 96 Stat. 1249	1
18 U.S.C. 351	16

Statutes, regulations, and rules—Continued:	Page	
18 U.S.C. 1111	16	
18 U.S.C. 1512	16	
18 U.S.C. 1751	16	
18 U.S.C. 3553(b)	2	
Fed. R. Crim. P.:		
Rule 32(c)(2)	2	
Rule 32(c)(2)(D)	1, 11	
 Sentencing Guidelines:		
§ 2A2.1(b)(1)	2, 10	
§ 2A2.2(b)(3)	2, 10	
§ 2A3.1(b)(4)	2, 10	
§ 2A4.1(b)(2)	2, 10	
§ 2B3.2(b)(3)	2, 10	
§ 2H1.3	2, 10	
§ 3A1.1	2	
§ 3A1.2	2	
§ 5K2.2	2, 11	
§ 5K2.3	2, 11	
 Miscellaneous:		
ABA, <i>Guidelines for the Fair Treatment of Victims and Witnesses in the Criminal Justice System</i> (1983)	11	
137 Cong. Rec. (daily ed. March 13, 1991)	3	
pp. S3195-S3198	3	
pp. S3214-S3219	3	
 Department of Justice, <i>Guidelines for Victim and Witness Assistance</i> , 48 Fed. Reg. (1983) :		
p. 33,775	14	
p. 33,777	2	
S. Hillenbrand & B. Smith, <i>Victims Rights Legislation: An Assessment of its Impact on Criminal Justice Practitioners and Victims</i> (May 1989)		11
National Organization for Victims, <i>Victims Rights and Services: A Legislative Directory</i> (1988)	11	
President's Task Force on Victims of Crime, <i>Final Report</i> (1982)	11	
Schulhofer, <i>Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law</i> , 122 U. Pa. L. Rev. 1497 (1974)	10	
S. 635, 102d Cong., 1st Sess. (1991)	3	

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-5721

PERVIS TYRONE PAYNE, PETITIONER

v.

STATE OF TENNESSEE

*ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

INTEREST OF THE UNITED STATES

In recent years, the United States has joined the States in seeking to make the criminal justice system more responsive and accountable to the victims of crime. As part of the effort to "enhance and protect the necessary role of crime victims * * * in the criminal justice process," Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2(b)(1), 96 Stat. 1248-1249, Congress has mandated that the presentence report prepared after conviction for a federal crime contain "information concerning any harm, including financial, social, psychological, and physical harm done to or loss suffered by any victim of the offense." *Id.* § 3, 96 Stat. 1249.¹ The Attorney General has promulgated guidelines

¹ In keeping with this direction, Fed. R. Crim. P. 32(e)(2)(D) now requires a presentence report to include "verified information

to carry out that Act's policies; those guidelines direct, *inter alia*, that "federal prosecutors should advocate the interests of victims at the time of sentencing." Department of Justice, *Guidelines for Victim and Witness Assistance*, 48 Fed. Reg. 33,777 (1983). The Sentencing Guidelines developed pursuant to the Sentencing Reform Act of 1984 also mandate consideration of the harm resulting from the defendant's conduct. Various Guidelines provide for increased sentences based on the vulnerability or status of the victim and the physical or psychological harm resulting from the crime. See Sentencing Guidelines §§ 2A2.1(b)(1), 2A2.2(b)(3), 2A3.1(b)(4), 2A4.1(b)(2), 2B3.2(b)(3), 2H1.3, 3A1.1, 3A1.2, 5K2.2, 5K2.3; see also 18 U.S.C. 3553(b).

The strong federal interest in permitting consideration of the harm inflicted on victims of crime is also reflected in provisions applicable to capital sentencing. For example, Fed. R. Crim. P. 32(c)(2) applies in full to prosecutions under the capital sentencing provisions of the Air Piracy Act, 49 U.S.C. App. 1472-1473. The death penalty provisions of the Anti-Drug Abuse Amendments Act of 1988 permit the sentencer to find an aggravating circumstance where "[t]he victim was particularly vulnerable due to old age, youth, or infirmity," 21 U.S.C. 848(n)(9), and also authorize any other factor aggravating the crime—including its impact on victims—to be presented to the sentencer upon notice to the defendant, 21 U.S.C. 848(h)(1)(B) and 848(n).² The Court's resolution of this case may directly affect the validity of those provisions of federal law, and it will certainly affect the fu-

stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed."

² The use of victim impact evidence has also been at issue in a capital proceeding under the Uniform Code of Military Justice. *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990).

ture development of federal law concerning the use of victim impact evidence at a capital sentencing hearing.³

STATEMENT

1. Petitioner was found guilty on two counts of first-degree murder and one count of assault with intent to commit murder in the first degree. He was sentenced to death for each of the murders and to 30 years' imprisonment for the assault. J.A. 25.

The victims were Charisse Christopher, her two year old daughter Lacie, and her three year old son Nicholas. The three lived together in an apartment in Millington, Tennessee, across the hall from petitioner's girlfriend. The State's evidence showed that, after injecting cocaine and drinking beer, petitioner entered the victims' apartment and made sexual advances toward Charisse. When he was rebuffed, petitioner repeatedly stabbed Charisse and both children with a butcher knife.

The police responded to a report by a neighbor who heard screams from the apartment. When the first officer arrived at the apartment building, he encountered petitioner, covered with blood, leaving the building. Petitioner struck the officer with an overnight bag and fled, but he was apprehended shortly thereafter. Inside the apartment, the police found blood on the walls and floor throughout the unit. Charisse and her children were lying on the floor in the kitchen. Charisse and

³ Recent legislative efforts demonstrate a continuing interest in the use of victim impact evidence in capital sentencing. For example, the President's crime bill recently introduced in Congress includes as statutory aggravating factors in capital cases the victim's vulnerability "due to old age, youth, or infirmity" and the victim's employment in certain official capacities. S. 635, 102d Cong., 1st Sess. § 101 (1991). The bill would also allow the government, upon notice to the defendant, to introduce evidence regarding non-statutory aggravating circumstances, including "the effect of the offense on the victim and the victim's family." *Ibid.* See generally 137 Cong. Rec. S3195-S3198, S3214-S3219 (daily ed. Mar. 13, 1991).

Lacie were dead from their wounds. Nicholas, although very seriously injured, was conscious, and he survived. A number of circumstances—including the state of the apartment, the screams, and the fact that Charisse was stabbed 41 times and sustained 42 defensive wounds on her arms and hands—indicated that she succumbed only after an intense and protracted struggle. See J.A. 25-30.

At trial, petitioner testified that he had not harmed any of the Christophers; that another man had raced by him as he was walking up the stairs to the floor where the Christophers lived; and that he had gotten blood on himself when, after hearing moans from the Christophers' apartment, he had tried to help the victims. J.A. 27, 30-34.

2. The jury returned guilty verdicts against petitioner on all counts. During the sentencing phase of the trial, the State called Charisse's mother, Mary Zvolanek. Asked how Nicholas had been affected by the murders of his mother and sister, Ms. Zvolanek testified (J.A. 3):

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell yes. He says, I'm worried bout my Lacie.

The State also showed a videotape, taken on the afternoon of the murders, of the apartment and the bodies of Charisse and Lacie. J.A. 37-38, 43-44.

Petitioner called four witnesses during the sentencing phase of the trial: a psychologist, his girlfriend, and his mother and father. The psychologist testified about the results of tests he administered—in particular, that petitioner had scored 78 on an I.Q. test, a result the psychologist described as "significant." J.A. 38-39. The latter three witnesses all testified that petitioner attended church, that they had not known him to use drugs or abuse alcohol, and that the offenses of which he had been convicted were inconsistent with what they

knew of him. 18 Tr. 1509-1510, 1558, 1559, 1565. Petitioner's girlfriend also testified that she had met petitioner during a period when she was being abused by her husband. She stated that petitioner was "very caring for" her three children, who were being affected by her marital difficulties, and that he had "got them back to their old self." *Id.* at 1508-1509. The children, the girlfriend also testified, had come to "love [petitioner] very much," and he behaved "[j]ust like a father that loved his kids." *Id.* at 1511. She described the children as "shocked" by the charges against petitioner, and she reported that they "believe he's innocent and * * * ask about him all the time." *Ibid.* Petitioner's mother and father described petitioner's background, and they testified that he had been a good son and that they loved him. *Id.* at 1565, 1570.

In arguing for the death penalty during closing argument, the State urged the jury to consider the continuing effects of Nicholas's experience and the other harm flowing from the murders. For instance, during rebuttal argument, the prosecutor stated (J.A. 13, 14, 15-16):

You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives. * * *

[Petitioner's counsel] talks about Pervis Payne and how well thought of he was in high school and how many people like him and love him. No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no, there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby. * * *

[Petitioner's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who loved Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why is it especially cruel, heinous, and atrocious, the burden that that child will carry forever.

The jury sentenced petitioner to death on each of the murder counts.

3. The Supreme Court of Tennessee affirmed petitioner's conviction and sentence. J.A. 25-47. The court rejected petitioner's contention that the admission of Ms. Zvolanek's testimony and the State's closing argument constituted prejudicial violations of his rights under the Eighth Amendment as applied in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989). The court characterized the grandmother's testimony as "technically irrelevant," but concluded that it "did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty, and was harmless beyond a reasonable doubt." J.A. 40.

The court determined that the State's argument was "relevant to [petitioner's] personal responsibility and moral guilt." J.A. 42. "When a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab a twenty-eight year old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room," the court explained, "the physical and mental condition of the boy he left for dead is surely relevant in determining his 'blameworthiness.'" J.A. 42. The court added that "[i]t is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of De-

fendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims." J.A. 42. Even if the argument violated *Booth* and *Gathers*, the court continued, the error was harmless beyond a reasonable doubt. J.A. 43.

SUMMARY OF ARGUMENT

1. This Court's decisions in *Booth* and *Gathers* are grounded in the proposition that evidence of the full extent of the harm caused by a murderer "is irrelevant to a capital sentencing decision" and "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." 482 U.S. at 503. Neither of these grounds justifies a constitutional rule excluding all evidence of the harm caused by a murder, including the characteristics of the person whose life was taken and the impact of the crime on family members.

a. *Booth's* ruling that a sentencer may not take account of the harm resulting from an offense contradicts both longstanding principles of criminal responsibility and the judgment reflected in legislation enacted by Congress and virtually all of the States. The Constitution does not prohibit the implementation of that judgment in the context of capital sentencing. This Court has made clear that an offender may be subjected to the death penalty even in the absence of proof that he intended to cause the victim's death. The Eighth Amendment cannot fairly be construed, therefore, to forbid consideration of the unintended consequences of criminal activity. The extent of the harm resulting from an offense is relevant to a constitutionally permissible sentencing consideration—the degree of retribution warranted by the offense. Consideration of a particular murderer's effects does not undercut the procedural requirements that this Court has prescribed for capital sentencing.

b. The fact that victim impact evidence may have different degrees of probative value in different cases or may on occasion be unduly inflammatory does not justify a constitutional rule excluding all victim impact evidence from capital sentencing proceedings. If evidence in a particular case is lacking in probative value, inflammatory, or otherwise unfairly prejudicial, the trial court can and should exclude it. A jury can be instructed as to those considerations that may not enter its decision to impose the death penalty. If victim impact evidence is improperly admitted, its admission can be fully and carefully reviewed on appeal. These are familiar tasks that trial and appellate courts are well-equipped to perform. The possibility that some evidence offered to show the effects of a murder should be excluded is scarcely a reason for erecting a constitutional rule barring all such evidence.

c. Finally, *Booth's* rigid rule is in severe tension with the principle that a sentencer cannot be precluded from considering any aspect of the defendant's character or record that may provide a basis for imposing a sentence other than death. If the jury must consider the defendant as a "uniquely individual human being[]," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion), then there is no convincing reason—and especially none grounded in the Constitution—to prevent the jury from also considering the unique characteristics or circumstances of the victim.

2. Principles of *stare decisis* do not preclude reexamination of *Booth* and *Gathers*. The Court's willingness to reconsider its prior decisions is, quite appropriately, greater in constitutional than in statutory cases, for in that setting there is no method of correcting errors short of constitutional amendment. Moreover, the Court has expressly stated that a prior decision is more likely to be overruled if it has bred confusion or anomalous results, or if it disserves principles of democratic self-governance. Both of these factors weigh heavily in favor of abandoning *Booth* and *Gathers*.

3. The evidence and argument at issue in this case did not violate any of petitioner's rights under the Eighth Amendment. Nicholas's grandmother's testimony was a simple, factual description of the continuing effects of petitioner's offenses on Nicholas. The State's argument concerning the effects of petitioner's offenses did not suggest that the death penalty should be imposed on the basis of any impermissible consideration, and in light of the evidence and argument presented on petitioner's behalf, the State's argument did not create an unacceptable risk of an unreliable sentencing determination.

ARGUMENT

I. THE EIGHTH AMENDMENT DOES NOT PROHIBIT THE ADMISSION OF VICTIM IMPACT EVIDENCE AT THE SENTENCING PHASE OF A CAPITAL TRIAL

In *Booth v. Maryland*, 482 U.S. 496 (1987), this Court held that the Eighth Amendment prohibits a jury from considering a victim impact statement at the sentencing phase of a capital murder trial. Two years later, in *South Carolina v. Gathers*, 490 U.S. 805 (1989), the Court applied that rule and held that it was error for the prosecutor to comment to the sentencing jury on the personal qualities of the victim. In both cases, the Court made it clear that the admissibility of victim impact evidence was not to be determined on a case-by-case basis, but that such evidence was *per se* inadmissible in the sentencing phase of a capital case except to the extent that it "relate[d] directly to the circumstances of the crime." *Booth*, 482 U.S. at 507 n.10; *Gathers*, 490 U.S. at 811.

Two complementary justifications were offered to support the rule announced in *Booth* and applied in *Gathers*. The first is that evidence of a murder victim's characteristics and the impact of the murder on others are, as a matter of constitutional law, "irrelevant to a capital

sentencing decision." *Booth*, 482 U.S. at 503. Evidence offered to support a death sentence must have "some bearing on the defendant's 'personal responsibility and moral guilt,'" *Booth* stated, and victim impact evidence fails that test to the extent it presents "factors about which the defendant was unaware, and that were irrelevant to the decision to kill." *Id.* at 502, 505; see *Gathers*, 490 U.S. at 810-811. Second, the Court held that even victim impact information of which a murderer was aware when he committed his offense may not be admitted because "it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." 482 U.S. at 505. In our view, neither justification is valid.

A. The criminal law has long embraced the principle that a defendant may be held personally responsible for the harm caused by his criminal activity, and that he may be punished even for the unintended consequences of that conduct. *Booth*, 482 U.S. at 516 (opinion of White, J.); *id.* at 519 (opinion of Scalia, J.); *Gathers*, 490 U.S. at 818-819 (opinion of O'Connor, J.); *id.* at 823-824 (opinion of Scalia, J.).⁴ The extent of the harm caused by an offense has historically influenced the choice of a particular sentence from within the range authorized by statute. The Sentencing Guidelines codify that practice in several respects. For various offenses (including assault, sexual abuse, kidnapping, extortion, and civil rights violations), the offense level is increased "[i]f the victim sustained bodily injury," and the extent of the increase is tied to the severity of the injury. Sentencing Guidelines §§ 2A2.1(b)(1), 2A2.2(b)(3), 2A3.1(b)(4), 2A4.1(b)(2), 2B3.2(b)(3), 2H1.3.

⁴ See generally Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. Pa. L. Rev. 1497, 1498 (1974) ("The criminal law attributes major significance to the harm actually caused by a defendant's conduct, as distinguished from the harm intended or risked.").

In addition, the Guidelines authorize upward departures for physical or extreme psychological injury resulting from other offenses. *Id.* at §§ 5K2.2, 5K2.3. Nothing in any of these Guidelines requires that the injury have been intended or foreseen.

In recent years, the federal government and virtually all the States have enacted legislation designed to place information about the harm caused by crimes before their sentencing authorities. As required by the Victim and Witness Protection Act of 1982, presentence reports prepared in accordance with Fed. R. Crim. P. 32(c)(2)(D) now include "verified information stated in a non-argumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed." Many state statutes provide for comparable victim impact statements or confer a right of allocution on the victims of crimes.⁵ The goal of these provisions is to ensure that sentencing authorities are provided with information enabling them to design a sentence that takes account of the harm a defendant has caused.⁶

⁵ See National Organization for Victims, *Victims Rights and Services: A Legislative Directory* 35, 39, 43 (1988). Victim impact legislation is consistent with recommendations of the ABA and the President's Task Force on Victims of Crime. ABA, *Guidelines for the Fair Treatment of Victims and Witnesses in the Criminal Justice System* (1983) ("[p]rior to the sentencing of an offender in a serious case, victims or their representatives should have the opportunity to inform the sentencing body of the crime's physical, psychological, and financial repercussions on the victim's family"); President's Task Force on Victims of Crime, *Final Report*, 33, 72, 76, 78 (1982).

⁶ The results of one survey reflected that large majorities of both prosecutors and judges view the financial, physical, and psychological information provided in victim impact statements to be important and useful in sentencing. S. Hillenbrand & B. Smith, *Victims Rights Legislation: An Assessment of its Impact on Criminal Justice Practitioners and Victims* 44, 71 (May 1989) (unpublished).

The Court in *Booth* took note of those statutes, observing that they “reflect[ed] a legislative judgment that the effect of crime on victims should have a place in the criminal justice system.” 482 U.S. at 509 n.12.⁷ *Booth* found that judgment impermissible in a capital case, however, on the ground that “death is a ‘punishment different from all other sanctions,’ *** and that therefore the considerations that inform the sentencing decision may be different from those that might be relevant to other liability or punishment determinations.” *Ibid.* While it is undoubtedly true that the death penalty is unique in its irrevocability and severity, see, e.g., *California v. Ramos*, 463 U.S. 992, 999 & n.9 (1983), those qualities do not justify placing a widely accepted and legitimate sentencing concern beyond the power of the States and Congress.

1. By its terms, the Eighth Amendment prohibits “cruel and unusual punishments.” Nothing in that language or the amendment’s history suggests that evidence of the harm caused by the defendant is irrelevant to the sentencing decision, whether in capital cases or otherwise. In upholding the death penalty’s application to certain categories of felony murder, the Court has held that a defendant who acts with reckless disregard for human life may be subject to the death penalty if he participates in a robbery that results in death. But, in the Court’s view, the Constitution would not permit imposition of the death penalty on the same defendant, acting in exactly the same way, with equal recklessness as to human life, if the robbery in which he participated

study conducted by the ABA Criminal Justice Section Victim Witness Project).

⁷ In defining the scope of the Eighth Amendment’s prohibition on cruel and unusual punishments, the Court has examined the historical treatment of the matter in question and comparable legislative judgments. See, e.g., *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989). No attempt has been made to justify *Booth* and *Gathers* on that basis.

did not result in the death of one of the victims. *Tison v. Arizona*, 481 U.S. 137, 148 (1987).⁸

In many other settings as well, it is clear that the impact on the victim determines whether the act may lead to a sentence of death. For example, even though the death penalty may not be imposed for the rape of an adult woman, see *Coker v. Georgia*, 433 U.S. 584 (1977), the case is dramatically changed if the victim dies as a result of injuries suffered during the rape. In that event, even if the defendant did not specifically intend to kill the victim, the defendant would be subject in most jurisdictions to prosecution for felony murder and, in light of *Tison*’s analysis, could constitutionally be sentenced to death. “[P]roportionality—at least as regards capital punishment—*** involves the notion that the magnitude of the punishment must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant’s blameworthiness.” *Enmund v. Florida*, 458 U.S. 782, 815 (1982) (O’Connor, J., dissenting).

Since that is so, it is difficult to understand why the Constitution should be construed to prohibit a jury or

⁸ In *Enmund v. Florida*, 458 U.S. 782, 801 (1982), the Court held that the death penalty could not constitutionally be imposed upon a defendant who, although a participant in a robbery in which two persons were killed, did not himself kill or attempt to kill and did not have any intention of participating in or facilitating the murders. The Court stated that a defendant’s “criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.” In our view, *Gathers* erred in its suggestion that the Court thereby recognized a limit on the factors that may be considered in determining whether to impose a death sentence on an offender who is constitutionally eligible for that penalty. See 490 U.S. at 810. Based upon a review of state statutes, jury verdicts, and other factors, *Enmund* defined a level of attributed responsibility for a homicide as to which the death penalty was held to be constitutionally disproportionate. *Enmund* did not, however, purport to address what factors may be made relevant to the imposition of a death sentence on an offender who was directly and personally responsible for taking a life.

a judge in a capital case from considering the nature of the life that a murder has cut short or the effects of the crime on the survivors. Legislative bodies can reasonably conclude—with the most powerful moral justification—that the lives ended by murder are more than just abstractions and that survivors and loved ones are themselves very much “victims” of the crime of murder.⁹ The reality of this point is underscored in case after case coming before this Court. Indeed, the present case demonstrates the profound anguish visited on a three-year-old child—the victim himself of a vicious assault—by the brutal murder of his mother and his two-year-old sister before his own eyes.

2. The Court has generally refused to constitutionalize the factors that a sentencer may consider in capital cases. “In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court’s principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty.” *California v. Ramos*, 463 U.S. at 999. As a matter of constitutional law, “[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, * * * the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.” *Id.* at 1008.

This Court’s consistent unwillingness—apart from *Booth* and *Gathers*—to constitutionalize the factors that the States or Congress may make relevant to the imposition of the death penalty is well founded. By its terms, the Eighth Amendment does not speak to the substantive

⁹ The *Guidelines for Victim and Witness Assistance* promulgated by the Department of Justice provide that “[t]he term ‘victim’ also includes the immediate family of a minor or a homicide victim.” 48 Fed. Reg. 33,775 (1983).

criteria that States or the federal government may employ to determine an appropriate punishment. Moreover, “[t]he deference [owed] to the decisions of the state legislatures under our federal system * * * is enhanced where the specification of punishments is concerned, for ‘these are peculiarly questions of legislative policy.’” *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (plurality opinion); *California v. Ramos*, 463 U.S. at 1000.¹⁰ Criminal sentences have traditionally rested on a wide variety of factors. Unlike determinations of guilt, in which “the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt” (*id.* at 1008), “sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances,” *Zant v. Stephens*, 462 U.S. 862, 902 (1983) (Rehnquist, J., concurring in the judgment).

Victim impact evidence may bear directly on the question whether, in a particular case, the death penalty is appropriate for purposes of retribution. Retribution is a recognized and legitimate purpose served by capital punishment. “[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.” *Gregg v. Georgia*, 428 U.S. at 184. See *Spaziano v. Florida*, 468 U.S. 447, 461 (1984). In assessing the extent to which a capital offense is an affront to humanity deserving of the death penalty, i.e., the extent to which the retributive purpose is served, the sentencer may reasonably take into account the full extent of the harm flowing from that particular offense.

¹⁰ See also *Skipper v. South Carolina*, 476 U.S. 1, 11 (1986) (Powell, J., concurring in the judgment) (“[T]he States, and not this Court, retain ‘the traditional authority’ to determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance.”). The same principle applies to evidence admitted to show the aggravated nature of an offense.

Powell
J.
CONCURRI
IN THE
JUDGMENT

The characteristics of the victim and the harm to survivors are not—like race or religion—considerations that the Constitution declares irrelevant to sentencing. In our view, for instance, nothing in the Constitution would prohibit a State from authorizing enhanced punishment for the murder of a parent of minor children—whether or not the offender was aware of the victim's status—because of the profound harm to children occasioned by that offense.¹¹ The harm resulting from a particular murder of that type is not, therefore, “constitutionally impermissible or totally irrelevant to the sentencing process,” *Zant v. Stephens*, 462 U.S. at 885. If the State may constitutionally prescribe enhanced punishment, including capital punishment, based on a status such as parenthood, the State should be equally free to admit evidence of the victim's family status and the impact of the murder on family members as factors bearing on the propriety of the death penalty.

3. Contrary to *Booth*'s suggestion, the procedural requirements the Court has imposed on capital sentencing systems provide no support whatever for a rule barring victim impact evidence. Under the Court's decisions, “[a] State must ‘narrow the class of murderers subject to capital punishment,’ * * * by providing ‘specific and detailed guidance’ to the sentencer.” *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987). Allowing a sentencer to consider victim impact evidence, however, in no way dilutes the specificity of the criteria that a State has selected to

¹¹ Indeed, this Court has already recognized that the victim's status can properly be considered in some settings as a factor weighing in favor of imposing the death penalty. See *Roberts v. Louisiana*, 431 U.S. 633, 636 (1977) (victim's status as a law enforcement officer may be considered as an aggravating factor). Federal statutes authorize the death penalty for the assassination of the President or Vice President, 18 U.S.C. 1751, 1111, a Member of Congress, a Cabinet officer, a Supreme Court Justice, or the head of an Executive Department, 18 U.S.C. 351, and a grand jury witness, 18 U.S.C. 1512.

distinguish offenders who are eligible for the death penalty from those who are not.¹²

Likewise, victim impact evidence is not at all inconsistent with the Court's requirement of individualized capital sentencing. See, e.g., *Zant v. Stephens*, 462 U.S. at 879; *Eddings v. Oklahoma*, 455 U.S. 104, 110-112 (1982). To the contrary, admitting victim impact evidence potentially enhances the individualized nature of the sentencing decision by adding to the information, particular to the defendant's crime, that the jury may consider in determining whether to impose a death sentence.

If victim impact information is, as *Booth* and *Gathers* concluded, “irrelevant to a capital sentencing decision” and “wholly unrelated to the blameworthiness of a par-

¹² *Booth* erred in suggesting that a State may not allow a sentencer even to consider facts that would not, standing alone, qualify as statutory aggravating circumstances. See 482 U.S. at 506 (relying on *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (Stewart, J.), for the proposition that victim impact information does not provide “a principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not”). In *Godfrey*, the plurality determined that a statutory aggravating circumstance, which authorized the death penalty for certain vile or inhuman murders, was unconstitutionally overbroad and vague. That conclusion does not suggest that, if the jury had found another statutory aggravating circumstance making the defendant eligible for the death penalty, it would have been constitutionally required to ignore aspects of the murder that, although not themselves sufficient to justify the death penalty, weighed in favor of such a sentence. As the Court explained in *Zant v. Stephens*, 462 U.S. at 878:

[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death.

See also *Barclay v. Florida*, 463 U.S. 939, 950 (plurality opinion).

ticular defendant" (482 U.S. at 503, 504; 490 U.S. at 810), logic would suggest that each capital defendant is constitutionally entitled to a jury instruction admonishing the jury not to consider any information of that type that has come to its attention during the guilt stage of a trial and not to refer to its own understanding of the harm that has resulted from a murder. Yet it is unthinkable, we believe, that the Eighth Amendment could be construed to prohibit the jury that sentenced petitioner from even considering his crimes' traumatic impact on the three-year-old survivor of petitioner's assault, the opportunities that were taken from the young survivor's mother and sister, and the loss imposed on others affected by petitioner's crimes. See Pet. Br. 13 (conceding that argument on this point was permissible, but maintaining that evidence was not). The flaw is not in the logic, but in the premise. It is simply wrong, we submit, to say that victim impact information is necessarily irrelevant to a constitutional sentencing determination.

B. Booth's second justification is that victim impact evidence, even if potentially relevant to the imposition of the death penalty, "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." 482 U.S. at 503; see *id.* at 505. This rationale suggests that even if the Constitution does not forbid the sentencer from considering harm to victims, evidence or prosecutorial comment on that issue is impermissible because it is too prejudicial to be allowed.

1. This reasoning is inconsistent with the fundamental principles that trial courts can determine the admissibility of evidence and that a properly instructed jury can be trusted to employ it for an appropriate purpose. As this Court explained in rejecting a contention that expert testimony on future dangerousness should be excluded from capital trials, "the rules of evidence generally extant at the federal and state levels anticipate that relevant

victim, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party." *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983).¹³ The task of identifying what information will be placed before a jury is, within very broad limits, a matter for the States. Cf. *Skipper v. South Carolina*, 476 U.S. 1, 15 (1986) (Powell, J., concurring in the judgment) (since "[t]his Court has no special expertise in deciding whether particular categories of evidence are too speculative or insubstantial to merit consideration by the sentencer," "[i]t makes little sense * * * to substitute our judgment of relevance for that of state courts and legislatures").

These considerations have particular force with respect to sentencing.¹⁴ In fact, in the area of capital sentencing, the plurality opinion in *Gregg* rejected an objection to "the wide scope of evidence and argument allowed at presentence hearings," saying (428 U.S. at 203-204):

We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. * * * So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much

¹³ We do not suggest that information material to sentencing must comply with the rules of evidence, see *Williams v. New York*, 337 U.S. 241 (1949), as long as a capital defendant has a sufficient opportunity to deny or explain that information, see *Gardner v. Florida*, 430 U.S. 349 (1977).

¹⁴ See *United States v. Tucker*, 404 U.S. 443, 446 (1972) (in the federal system, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information he may consider, or the source from which it may come"); *United States v. Grayson*, 438 U.S. 41, 50 (1978); *Williams v. New York*, 337 U.S. 241, 246 (1949).

information before it as possible when it makes the sentencing decision.

2. *Booth* suggested that the special characteristics of victim impact evidence warrant a departure from these principles. In particular, *Booth* expressed concern that, if such evidence is admissible, the imposition of capital punishment might turn on the willingness and ability of the victim's relatives to sway the jury, and difficult-to-rebut overstatement regarding the deceased's character or the grief of survivors. 482 U.S. at 505-507. In our view, none of those concerns justifies a constitutionally based *per se* rule excluding victim impact evidence in capital sentencing proceedings.

It cannot be denied, as the Court noted in *Booth*, 482 U.S. at 505, that some family members are more articulate than others, and that some are more willing than others to express their grief to a jury. But such differences among witnesses are an inescapable feature of a criminal justice system in which the participants are individuals of widely differing backgrounds, abilities, and experiences. All witnesses, including witnesses for the defense, differ in their ability to present their testimony in an effective and persuasive manner, just as defense lawyers and prosecutors differ in their ability to present evidence and argument to the jury. There is nothing so distinctive about victim impact testimony as to raise these ordinary and unavoidable variations to the level of a constitutional infirmity, so as to require exclusion of an entire category of evidence that States or Congress have determined to be proper and appropriate.

Of course, a capital sentence decision may not be based on constitutionally impermissible factors such as the race of the victim. See *McCleskey v. Kemp*, 481 U.S. 279 (1987). But the risk that juries may base their decisions on such impermissible factors is present regardless of whether victim impact evidence is admitted, and it is by no means clear that introduction of victim impact evi-

dence will have the effect of increasing that risk; indeed, it may have the opposite effect. The evidence may personalize the victim for the jurors and make it more likely that they will empathize with the family members of a victim with whom the jurors might otherwise feel that they have very little in common.

In any event, the trial court can control the presentation of the evidence to minimize the risk of its misuse. The court can instruct the jury not to allow impermissible considerations such as race to influence the exercise of its discretion. And if the risk of misuse in a particular case is too great, the court can simply exclude the evidence on that ground. But the risk that the jury might occasionally misuse particular evidence does not justify a categorical rule, grounded in the Constitution, that victim impact evidence may never be admitted at a capital sentencing hearing.

It is true, of course, that testimony by members of the victim's family can be highly charged; as a result, such evidence may, if presented in an improper manner or for improper purposes, create an unacceptable risk that a death sentence was imposed for arbitrary and capricious reasons. But that possibility does not justify what *Booth* created—a prophylactic, constitutionally based rule excluding all such evidence. Trial courts routinely exclude unduly inflammatory evidence. And—in an extreme case—if the admission of prejudicial matter has deprived the sentencing determination of the reliability that the Eighth Amendment requires, the defendant may be constitutionally entitled to vacation of his sentence on that ground. See *Darden v. Wainwright*, 477 U.S. 168, 178-179, 183-184 n.15 (1986); *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980) (procedures in sentence hearings must be designed to ensure that “death penalty is * * * imposed on the basis of ‘reason rather than caprice or emotion’”). Nor is the promise of reliability in sentencing proceedings an empty one; this Court “has gone to extraordinary measures to ensure that the prisoner sen-

tenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). In view of those significant protections, claims that victim impact evidence is improper and unfairly prejudicial can appropriately be resolved in each individual case.

C. An outright prohibition on victim impact evidence is especially unwarranted in view of this Court's insistence on a rule of broad admissibility for defense evidence in capital sentencing proceedings. The Court has held that "the sentencer * * * [cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). See also *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, *supra*. When combined with the rule of *Booth* and *Gathers*, that principle creates an anomaly. The sentencer is required to consider the full range of facts about the defendant's character and circumstances, but may not be told anything of the character of the victim or the extent of the harm the defendant has inflicted upon others. In this case, for instance, petitioner relied upon testimony from his parents and his girlfriend that he had been a good son, was a caring person, and was loved and missed by the girlfriend's children, see pp. 4-5, *supra*. Yet, he maintains, it was error for the State to offer any evidence regarding the extent to which Nicholas suffered as a result of the loss of his mother and sister.

We can discern nothing in the Constitution that requires such a one-sided presentation. As Justice Cardozo wrote for the Court, "[J]ustice, though due to the accused, is due to the accuser also. * * * We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). If a sentencing jury is to "express the con-

science of the community on the ultimate question of life or death," *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), there should be no constitutional prohibition against permitting the jury to have a complete picture of the act the defendant has committed and the lives it has profoundly affected.

II. PRINCIPLES OF STARE DECISIS DO NOT REQUIRE CONTINUED ADHERENCE TO BOOTH AND GATHERS

The doctrine of *stare decisis* serves important purposes in our legal system. The doctrine promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. See *Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986). But the Court has recognized that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). And it is well settled that *stare decisis* is less inflexible in constitutional cases than in statutory cases, because in the former cases "correction through legislative action is practically impossible." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting). See also *Monell v. Department of Social Services*, 436 U.S. 658, 696 (1978).

Although the Court has not adopted a "rigid formula" for deciding when a prior construction of the Constitution should be overruled, *Vasquez*, 474 U.S. at 266, it has identified several factors that bear on that determination. One factor is whether the prior rule has bred confusion or led to anomalous results. *Solorio v. United States*, 483 U.S. 435, 448-450 (1987); *Erie R.R. v. Tompkins*, 304 U.S. 64, 74-78 (1938). Another is whether a prior decision, even one of fairly recent vintage, "disserves principles of democratic self-governance." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985).

Both of these factors, in our view, point strongly toward reconsideration of *Booth* and *Gathers*.

Without question, *Booth* has spawned confusion and uncertainty in the lower courts. See *Gathers*, 490 U.S. at 813 (O'Connor, J., dissenting) (citing cases); *Mills v. Maryland*, 486 U.S. 367, 395-398 (1988) (Rehnquist, C.J., dissenting). Although the *Booth* Court painted with a broad brush, questions linger as to whether *Booth* outlaws admission of *any* statements or evidence relating to the character of the victim or the impact of the crime, or whether *Booth's* prohibition applies only to detailed victim impact statements of the type at issue in that case. *Booth* and *Gathers* also leave open the difficult issue whether and, if so, what victim characteristics remain legitimate subjects for consideration in sentencing. Although the Court has stated that certain victim characteristics, such as the victim's status as a police officer, may appropriately be made an aggravating circumstance, see *Roberts v. Louisiana*, *supra*, it remains unclear whether the victim's youth, age, or infirmity may be taken into account, see 21 U.S.C. 848(n)(9); whether the defendant must have been aware of those factors in order for them to be considered; or even whether the defendant must have acted with intent to exploit those characteristics.

We recognize the possibility that, over time, this Court could reduce the level of *Booth*-spawned uncertainty by deciding a series of cases limiting and defining *Booth's* reach. But the hard fact remains that the principles informing *Booth's* exclusionary approach have no natural limits; as a result, the process of fixing its reach will necessarily have an *ipse dixit* quality to it, rather than constituting a logical extrapolation from principles that the *Booth* majority laid down. For practical reasons, moreover, even a broad prohibition on victim impact evidence would be unlikely to lay this issue to rest. A jury necessarily becomes aware of some of the victim's characteristics during the guilt phase of the trial; the jury

is also cognizant, at least in a general sense, of the impact of a murder on family members of the victim. Unless juries are to be instructed not to take account of those factors in determining whether to impose that penalty, *Booth* and *Gathers* will result in an anomalous and, we submit, inherently uncertain situation. Although the prosecution will be prohibited from adding to the information before a jury or commenting on it, the jury will be left, unguided by argument or instructions from the court, to place whatever weight it chooses on victim impact information that reaches it during trial.

More fundamentally, *Booth* and *Gathers* substantially interfere with the traditional responsibility of legislatures to determine which factors shall be relevant in imposing criminal sentences. See *Gore v. United States*, 357 U.S. 386, 393 (1958). As we have noted, both Congress and many state legislatures have in recent years enacted legislation recognizing and protecting the rights of victims of crime. *Booth* is not only inconsistent with the significant body of victim rights legislation that has emerged in recent years, but it forecloses the opportunity for further development of community values through additional legislation on that subject. In view of its doctrinal weakness and its interference with the considered judgment of democratic institutions with respect to sentencing, *Booth* and *Gathers* should not stand.

III. THE VICTIM IMPACT EVIDENCE AND ARGUMENT AT ISSUE IN THIS CASE DID NOT VIOLATE PETITIONER'S RIGHTS UNDER THE EIGHTH AMENDMENT

The only evidence of the impact of petitioner's offenses introduced during the sentencing phase of petitioner's trial was Nicholas's grandmother's description—in response to a single question—of the child's reaction to the murder. That testimony was an objective description of Nicholas's conduct, justifying an inference that the murder had had a severe impact on him. The testi-

mony was moving, because it conveyed Nicholas's difficulty in coming to terms with the irrevocable loss of his mother and sister, but it was not inflammatory in tone or content. Accordingly, absent a strict prohibition against victim evidence, the admission of evidence of Nicholas's emotional reaction to the murders would not violate any of petitioner's Eighth Amendment rights.

The State's closing argument during the sentencing phase could be said to violate *Booth* and *Gathers* in three respects. First, the State highlighted the future effect of the murders on Nicholas, calling the jury's attention to "what Nicholas Christopher will carry in his mind forever" (J.A. 13; see J.A. 15) and the implications of his having to grow up without his mother and sister (J.A. 15-16). Second, the State reminded the jury of the lost opportunities resulting from the murder, saying that Lacie "never had a chance to grow up" and that "there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anyone to take her to her high school prom" (J.A. 14). Finally, the State observed, in response to defense evidence suggesting that petitioner had led an exemplary life, that Nicholas's mother and sister, had also led "exemplary lives" (J.A. 17).¹⁵

¹⁵ Two aspects of the prosecution's argument that petitioner challenges do not, in our view, present any issue under *Booth* or *Gathers*. The prosecutor's suggestion that the jury would "provide the answer" to questions Nicholas would later have about "what type of justice was done" and "what happened" (J.A. 12) did not entail any argument for the death penalty based upon the harm to victims or the characteristics of the deceased. Further, it was not the equivalent, as petitioner suggests, of relying on comments by surviving family members as to the punishment appropriate for a given offense. Similarly, the prosecution's use of the murder weapon during rebuttal argument does not raise any issue of victim impact evidence or argument, and in fact presents no substantial issue of federal constitutional law. See, e.g., *Darden v. Wainwright*, 477 U.S. 168, 178-184 (1986).

Those comments could not have rendered petitioner's sentencing hearing unfair or unreliable. The comments contained no suggestion that the jury should impose the death penalty on the basis of an arbitrary or unconstitutional consideration, such as race, political affiliation or religious belief. In large measure, the comments were responsive to a theme petitioner had advanced in his evidentiary presentation and argument, and neither the evidence itself nor the prosecutor's comments on it were unduly inflammatory. There is therefore nothing in the record of this case and the principles of the Eighth Amendment that would justify requiring the State to provide petitioner a new sentencing hearing.

CONCLUSION

The judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted.

KENNETH W. STARR

Solicitor General

ROBERT S. MUELLER, III

Assistant Attorney General

WILLIAM C. BRYSON

Deputy Solicitor General

STEPHEN L. NIGHTINGALE

Assistant to the Solicitor General

APRIL 1991

MAR 18 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PERVIS TYRONE PAYNE,

Petitioner,

—VS.—

STATE OF TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

**BRIEF OF SOUTHERN CHRISTIAN LEADERSHIP
CONFERENCE AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

STEPHEN B. BRIGHT*
83 Poplar Street
Atlanta, GA 30303
(404) 688-1202

**Counsel of Record*

JOHNNIE E. WALLS
P.O. Box 634
Greenville, MS 38701
(601) 335-6001

J. L. CHESTNUT
CHESTNUT, SANDERS,
SANDERS, TURNER,
WILLIAMS & PETTAWAY
P.O. Box 1305
Selma, AL 36701
(205) 875-2964

Counsel for Amicus Curiae

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICUS AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	6
A. RACE AND CLASS CONSIDERA- TIONS ALREADY INFLUENCE THE SENTENCING DETERMINATION IN CAPITAL CASES.....	8
B. ADMISSION OF VICTIM WORTH EVIDENCE WOULD INCREASE THE INFLUENCE OF RACE AND STATUS ON THE SENTENCING DECISION.....	22
CONCLUSION.....	28

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Amadeo v. Zant, 486 U.S. 214 (1988)	21
Batson v. Kentucky, 476 U.S. 79 (1986), 8, 23, 27	
Booth v. Maryland, 482 U.S. 496 (1987), passim	
Caldwell v. Mississippi, 472 U.S. 320 (1985)	10
California v. Brown, 479 U.S. 538 (1987)	5, 6
Dobbs v. Zant, 720 F. Supp. 1566 (N.D. Ga. 1989)	24
Eddings v. Oklahoma, 455 U.S. 104 (1982)	9
Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988)	22
Gregg v. Georgia, 428 U.S. 153 (1976)	5, 11
McCleskey v. Kemp, 481 U.S. 279 (1987)	25, 30
Morris v. Commonwealth, 766 S.W.2d 58 (Ky. 1989)	28
Penry v. Lynaugh, 492 U.S. 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)	6

South Carolina v. Gathers, 490 U.S. 805 (1989)	passim
Turner v. Murray, 476 U.S. at 33-34	8, 10, 25
Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983), <u>cert. denied</u> , 464 U.S. 1053 (1984)	28
Zant v. Stephens, 462 U.S. 862 (1983)	5, 8, 10
STATUTES	
18 U.S.C. §§ 351, 1111, 1751	30
MISCELLANEOUS	
Alabama Capital Representation Resource Center, <u>Alabama Capital Reporter</u> , Vol. 1, No. 5 at I-34 (July-Aug. 1990)	12
Belkin, <u>Texas Judge Eases Sentences for Killer of 2 Homosexuals</u> , N. Y. Times, Dec. 17, 1988, § 1, at 8, col. 5	19, 28
Brief <u>Amici Curiae</u> of Murder Victims' Families for Reconciliation, <u>Ohio v. Huertas</u> , No. 89-1944 at 32-36	29
Carter, <u>When Victims Happen to Be Black</u> , 97 Yale L.J. 420 (1988)	19
Coady, <u>When Life is Cheap</u> ,	

- The Atlanta Constitution,
Feb. 16, 1991 at B1, B10..... 17
- Columbus Ledger-Enquirer, Aug.
14, 1988, § B at B-11..... 17
- Columbus Ledger-Enquirer,
Aug. 7, 1988, § B, at B-1..... 14
- Columbus Ledger-Enquirer, Feb. 11,
1991, § A, at A-1..... 18
- Davis, Law as Microaggression,
98 Yale L. Jou. 1559, 1559 n. 1
(1989) 17
- Death Row U.S.A. at 5-8 (Jan. 21,
1991) 11
- Johnson, Unconscious Racism and the
Criminal Law, 73 Cornell L.
Rev. 1016, 1023-1024 (1988) 23, 24
- Joint Center for Political
Studies, Black Elected
Officials: A National Roster
at 127, 142 (1989)..... 20
- Pillsbury, Emotional Justice:
Moralizing the Passions of
Criminal Punishment, 74
Cornell L. Rev. 655, 708 (1989).... 18
- S. Gross & R. Mauro, Death and
Discrimination: Racial
Disparities in Capital
Sentencing 43-44 (1989)..... 12
- Sherman, Is Mississippi Turning,
The National Law Journal,
Feb. 20, 1989, at 1, 24-25 20

- State v. Brooks, Superior Court of
Muscogee Co. Nos.
38888 & 54604..... 13,14,15,16
- U.S. Department of Justice,
Crime in the United States
at 10 (Aug. 5, 1990) 11
- U.S. Department of Justice,
Sourcebook of Criminal Justice
Statistics at 390 10
- U.S. General Accounting Office,
Death Penalty Sentencing: Research
Indicates Pattern of Racial
Disparities 5(February 1990) 13

QUESTION PRESENTED

Whether the admission of victim worth and victim impact evidence, which necessarily brings into consideration such factors as the race, social status, and other personal characteristics of the victim of a crime, may be properly considered in determining whether to give the offender the death penalty?

INTEREST OF AMICUS CURIAE

The Southern Christian Leadership Conference (SCLC) is a national membership organization founded in 1957 by the Rev. Martin Luther King, Jr., to bring about an end to racial discrimination in American life and obtain full citizenship for African Americans. One of the goals of the SCLC is to secure equal justice for African Americans in the state and federal courts. SCLC has long been active in efforts to see that black victims of crime are treated equally with white victims by police, prosecutors, judges, juries and other actors in the criminal justice system.

SCLC is interested in this case because it believes that distinctions based upon race and class of the victim already play too large a role in determining punishment

in the criminal justice system. Crimes involving black victims are not investigated as thoroughly by police, prosecuted as vigorously by prosecutors, or punished as severely by judges and juries as cases involving white victims.

This problem is particularly pronounced in cases involving the death penalty. Even though black citizens have been the victims in about half of the total number of homicides in this country in the last twenty years, the death penalty is used primarily to punish the murders of white people. Imposition of the death penalty in white victim cases when many other similar or more aggravated cases involving black victims are punished with less severe sentences sends a powerful and unmistakable message to the African American community that black lives are not valued as much by our society as the lives of white citizens.

SCLC believes that overturning Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989), would exacerbate these problems and formalize a system of separate and unequal infliction of the death penalty. Accordingly, SCLC submits this brief as amicus curiae to express its concerns and urge this Court to reaffirm Booth. In our multi-racial society, the rule in Booth is constitutionally required to minimize the influence of race and class considerations in the capital sentencing process and to guarantee that all life is given equal protection of the laws.

SUMMARY OF ARGUMENT

Overturning Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989), will undermine the Eighth Amendment's most fundamental requirement: that the capital sentencing

decision must be based upon a principled evaluation of the defendant's background and character and the circumstances of the crime guided by objective standards and not upon impermissible or capricious factors. California v. Brown, 479 U.S. 538 (1987); Zant v. Stephens, 462 U.S. 862, 879, 885 (1983); Gregg v. Georgia, 428 U.S. 153 (1976).

Even without the admission of victim worth evidence, the sentencing decision in capital cases is often influenced by the extent to which the lives of prominent, majority race persons are valued by prosecutors and sentencers of the same race and background over the lives of those who are poor and members of minority groups. Overruling Booth and Gathers would increase the role that the color and standing of the victim plays in determining which cases are punishable by death by making such value judgments a

regular and explicit feature of the process.

Admission of victim worth and victim impact evidence will result in a capital sentencing process in which the difference between a sentence of death or life imprisonment may turn on the race and social prominence of the victim and the victim's survivors, the articulateness of the survivors, their willingness to express their emotions in public, and other factors that have little relation to "a reasoned moral response to the defendant's background, character and crime." Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 2934, 2951, 106 L.Ed.2d 256, 279 (1989), quoting California v. Brown, 479 U.S. 538, 545 (1987) (emphasis in original).

Overruling Booth and Gathers would not only be inconsistent with this Court's Eighth Amendment decisions; it would be a

retreat from this Court's "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Batson v. Kentucky 476 U.S. 79, 80 (1986).

ARGUMENT

THE RULE IN BOOTH IS REQUIRED TO MINIMIZE THE INFLUENCE OF RACE AND CLASS CONSIDERATIONS IN THE CAPITAL SENTENCING PROCESS AND TO GUARANTEE THAT ALL LIFE IS GIVEN EQUAL PROTECTION OF THE LAWS.

The Court's decisions in Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989), follow from the well established Eighth Amendment requirement that the sentencing decision in a capital case be based upon "the character of the individual and the circumstances of the crime" and not upon "factors that are constitutionally irrelevant to the sentencing process" such as race, social status, religion or political

affiliation, Zant v. Stephens, 462 U.S. 862, 879, 885 (1983), and from the requirements of the Eighth and Fourteenth Amendments that capital sentencing procedures may not carry with them an unacceptable risk race influencing the determination of sentence. Turner v. Murray, 476 U.S. 28, 35-36 (1986); Batson v. Kentucky, 476 U.S. 79, 85 (1986).

Overruling Booth and Gathers and allowing victim worth evidence would be inconsistent with these well established principles. The social status and race of the victim would become two of the foremost considerations in determining who dies. The death penalty, already used primarily in white-victim cases, would increasingly become a sanction imposed for the deaths of prominent white persons. Determinations of sentence based upon the characteristics of the victim and the surviving family

members would result in an arbitrariness and capriciousness that is not tolerable under the Court's "insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

A. RACE AND CLASS CONSIDERATIONS ALREADY INFLUENCE THE SENTENCING DETERMINATION IN CAPITAL CASES.

The race and prominence of the victim are factors which already lurk dangerously close to the surface in determining whether the death penalty is sought by a prosecutor, whether a plea is offered in exchange for a less severe sentence, and whether a jury imposes a death sentence. Overruling Booth would allow the role that the color and standing of the victim to influence the process beyond constitutionally acceptable limits.

The sentencing decision in a capital case involves "a 'highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves.'" Turner v. Murray, 476 U.S. at 33-34, quoting Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7 (1985), and Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in the judgment). "Because of [this] range of discretion, there is a unique opportunity for racial prejudice" -- including "[m]ore subtle, less conscientiously held racial attitudes" -- to "operate but remain undetected." Turner, 476 U.S. at 35.

Black citizens have been the victims in almost half of the total homicides in this country in the last twenty years.¹⁴

1.

U.S. Department of Justice, Sourcebook of Criminal Justice Statistics at 390, table 3.131 (1989). Black persons were the victims in 9,314 murders, 49.1 percent of (continued...)

Nevertheless, the death penalty is inflicted primarily in cases involving white victims. Only 17 of the first 143 executions that have taken place in the nation since Gregg were for murders of black people.²⁴

In the South, which has much of the nation's black population, the patterns are particularly stark. For example, in Alabama, although black citizens were the victims of 65 percent of the murders in 1989, 81 percent of the cases in which death has been imposed have involved mur-

1. (...continued)

the total, in the United States in 1989, the most recent year for which statistics are available. U.S. Department of Justice, Crime in the United States at 10 (Aug. 5, 1990). White persons were the victims in 9,103 murders, 48 percent of the total, that year. Id.

2.

NAACP Legal Defense Fund, Death Row U.S.A. at 5-8 (Jan. 21, 1991). In two of those 17 cases, there was also a white victim. Id. at 6-7.

ders of white people.³ In Georgia, though blacks were the victims of 63.5 percent of the murders between 1976 and 1980, 85 percent of the cases in which death was imposed involved murders of whites.⁴ An analysis of 28 studies by the General Accounting Office found that murders of white persons are more likely to be punished by death than murders of black persons.⁵

3. Alabama Capital Representation Resource Center, Alabama Capital Reporter, Vol. 1, No. 5 at I-34 (July-Aug. 1990).

4. S. Gross & R. Mauro, Death and Discrimination: Racial Disparities in Capital Sentencing 43-44 (1989). In Georgia, those who kill whites are almost ten times as likely to be sentenced to death as those who kill blacks; in Florida the ratio is about eight to one, in Illinois six to one, in Mississippi 5.5 to one, and in North Carolina 2the ratio is four to one. Id. at 44, 88-94.

5. The General Accounting Office reported:

(continued...)

The reality behind these disparities is illustrated by the practices in Georgia's Chattahoochee Judicial Circuit, where African Americans are the victims of 63 percent of the homicides but in 78 percent of the capital cases tried in that circuit -- twenty-one of twenty-seven cases -- the victims were white.⁶ In a case

5. (...continued)
In 82 percent of the studies, race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.

U.S. General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities 5 (February 1990).

6. State v. Brooks, Superior Court of Muscogee Co. Nos. 38888 & 54604, Sept. 11-14, 1990 hearing, Defendant's Exhibit 3. Defendant's Exhibits 1A, 3-10. The racial disparities were found for various types of cases, such as those involving other felonies besides murder. For example, the death penalty was sought in 48 percent of

(continued...)

involving the murder of the daughter of a prominent white contractor, the district attorney personally called the contractor and asked him if he wanted the death penalty.⁷ When the contractor said yes, the district attorney told him that was all he need to know.⁸ He obtained the death penalty and was rewarded with a \$5000 contribution from the contractor when he ran for judge in the next election.⁹

6. (...continued)
the cases involving murders of white females, but only 9.4 percent of the cases involving murders of black females. Id., Transcript of Sept. 11, 1990 hearing at 130.

7. Davis v. Kemp, Super. Ct. of Butts Co., Ga. No. 86-V-865, Transcript of Hearing of Oct. 21, 1988, at 38; Claybrook, Slain's girl's father top campaign contributor, Columbus (Ga.) Ledger-Enquirer, Aug. 7, 1988, § B, at B-1 col. 3, B-10.

8. Davis v. Kemp, supra n. 7, Transcript at 38; Claybrook, supra n. 7, at B-10.

9.

(continu

In another white victim case, the prosecutor called a press conference after meeting with the victim's family, and said that based upon his meeting with the family, he had decided to pursue the death penalty.¹⁰ The views of surviving relatives were solicited in other white victim cases and the families were kept informed of the development of the cases.¹¹

The families of black victims in the Chattahoochee Circuit do not get this treatment; indeed, they get no treatment at all. They are not asked by the

9. (...continued)
Davis v. Kemp, supra n. 7, Transcript at 38-39; Claybrook, supra n. 7, at B-1, B-10. The contractor also contributed \$3,000 to the campaign of the assistant district attorney who handled the case to become district attorney. Id.

10. State v. Brooks, supra n. 6, Transcript of Sept. 12, 1990 hearing at 155-156; Defendant's Exhibit 41.

11. State v. Brooks, supra n. 6, Transcript of Sept. 12, 1990 hearing at 67-69, 152-153.

district attorney what sentence they want or even kept informed of developments in the cases.¹² They usually hear about the disposition of cases involving the murder of their loved ones from friends or in the media.¹³ Not surprisingly, a survey by the local newspaper found that "large numbers of the city's black residents feel that blacks do not receive the same treatment as whites in the criminal justice system.

12.

State v. Brooks, supra n. 6, Transcript of Sept. 12, 1990 hearing at 177-178, 184-185, 199-200, 203, 205-207, 212-213, 221-222, 227-229.

13.

See, e.g., State v. Brooks, supra n. 6, Transcript of Sept. 12, 1990 hearing at 177-78 (father of murdered son learned "from the street" of arrest and that the "guy who actually did the killing got 25 years, but I don't know if that's true or not"); 200 (mother of murdered daughter working in yard when she heard surviving daughter screaming that she had heard about disposition of case on television); 206 (mother of murdered daughter felt "like I should've been contacted about my daughter, and it hurts real bad. Nobody have contacted me about her at all.")

This belief . . . comes up any time a black defendant receives the death penalty."¹⁴ This recognition that crimes against black citizens are not treated equally with crimes against whites is found in black communities throughout the nation.¹⁵

That view was reinforced recently in another white victim case in the Chattahoochee Circuit in which it appeared

14.

Winn, Racism concern is nothing new in Columbus, Columbus Ledger-Enquirer, Aug. 14, 1988, § B at B-11.

15.

See, e.g., Davis, Law as Microaggression, 98 Yale L. Jou. 1559, 1559 n. 1 (1989) (citing one national study conducted in 1988 showing that 61 percent of black citizens believe that minorities do not receive equal treatment in the criminal justice system and other national and local surveys showing that blacks believe they are not treated as well as whites in the courts); see also Coady, When Life is Cheap, The Atlanta Constitution, Feb. 16, 1991 at B1, B10 (Mothers of Murdered Sons organized by black families and ministers in Atlanta because lack of attentiveness to black victimization by "Georgia's predominantly white judicial system").

that the death penalty was imposed on the black defendant not so much because of the crime -- a convenience store robbery and murder which tragically is all too common -- but the prominence of the victim's father, the commander of the Infantry Training Center at the Fort Benning Army base.¹⁶

Black victims are treated differently than whites in the Chattahoochee Judicial Circuit and elsewhere because of the absence of black citizens in the process and because of the "familiar psychological tendency [of] predominantly white decision makers . . . to sympathize more with whites than blacks."¹⁷ This tendency was

16.

Walsh, Walker gets death sentence for 1988 store clerk slaying, Columbus Ledger-Enquirer, Feb. 11, 1991, § A, at A-1.

17.

Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, 74 Cornell L. Rev. 655, 708 (1989); see also (continued...)

stated bluntly by a Texas judge: "'When a white is killed, the whites are upset. When a black is killed, the blacks are upset.'"¹⁸ However, black citizens have limited opportunity to express their outrage through the criminal justice system as judges, prosecutors or jurors. Quite often, they have no opportunity at all.

For example, although twenty-seven percent of Georgia's population is black, all 45 elected district attorneys are

17. (...continued)

Carter, When Victims Happen to Be Black, 97 Yale L.J. 420 (1988); Dane & Wrightsman, Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts, in The Psychology of the Courtroom 104-06 (1982). The effect is particularly pronounced and result in the most severe sentences where the victim is of the same race, and the defendant is of a different race, from that of the jurors. Id. at 106.

18.

Belkin, Texas Judge Eases Sentences for Killer of 2 Homosexuals, N. Y. Times, Dec. 17, 1988, § 1, at 8, col. 5.

white and only six of the state's 138 Superior Court judges are black.¹⁹ There is a similar absence of black citizens in the official positions in the court systems in other states.²⁰

Thus, the decision to seek death or to resolve cases with a plea bargain to a sentence less than death is frequently made by officials who may not be as sensitive to loss of life in the black community as in their own communities. In one judicial circuit in Georgia, for example, those decisions are made by a

19.

Joint Center for Political Studies, Black Elected Officials: A National Roster at 127, 142 (1989).

20.

Sherman, Is Mississippi Turning, The National Law Journal, Feb. 20, 1989, at 1, 24-25 (only one black judge among 38 circuit court judges and none among 40 chancery court judges in Mississippi; only four black judges among 125 on circuit courts in Alabama; only five black judges among the 178 on the district courts in Louisiana).

district attorney who has remained in office even after it was discovered that he had secretly directed jury commissioners to underrepresent black citizens on the lists from which grand and petit jurors were drawn.²¹ That district attorney, who has prosecuted almost 30 capital cases, has used 94 percent of his strikes against blacks in cases involving a white victim and a black defendant.²²

Because of such practices and the relatively small number of blacks in the population, black citizens have little opportunity to participate as jurors. The district attorney in Jackson, Mississippi, has stated that his strategy for jury selection in a capital case is to "get rid

21.

Amadeo v. Zant, 486 U.S. 214, 217 (1988).

22.

Horton v. Zant, 11th Cir. No. 90-8522, Petitioner's Exhibit 10 (96 strikes used against black jurors and only six against white jurors).

of as many" blacks as possible with his peremptory strikes.²³ In Chambers County, Alabama, where official marriage records are still kept separately at the courthouse in books engraved with the words "white" and "colored,"²⁴ the district attorney has divided prospective jurors into four lists -- "strong," "medium," "weak" and "black" -- and then used all 23 of his peremptory challenges to eliminate the 23 black venirepersons from service in a capital case involving a white victim and black defendant.²⁵

23.

Edwards v. Scroggy, 849 F.2d 204, 207 (5th Cir. 1988)

24.

State v. Jefferson, Circuit Court of Chambers County, Alabama, No. CC-81-77, Petitioner's Postconviction Hearing Exhibit 7 (January 25, 1989).

25.

Id., Petitioner's Postconviction Exhibit 3.

Despite the Court's decision in Batson v. Kentucky, such a strategy continues to be effective in limiting black participation in the process. In Georgia's Chattooga Judicial Circuit, it was recently shown that the local Superior Court judges have yet to find a single reason given by a prosecutor for striking a black juror in any criminal case inadequate under Batson.²⁶ See also Johnson, Unconscious Racism and the Criminal Law, 73 Cornell L. Rev. 1016, 1023-1024 (1988).

The predominantly white juries selected -- whether because of these practices or because of a low percentage of blacks in the population -- often bring with them to the jury box, either consciously or unconsciously, "racial stereotypes and assump-

26.

State v. Bailey, Super. Ct. Muscogee County, Ga., No. SU-90-CR-000744, Affidavits of Michael E. Garner, Robert G. Jones, II, Andrew C. Dodgen filed May 30, 1990.

tions" which influence them "in the direction of findings of black culpability and white victimization, . . . black immorality and white virtue, . . . blacks as social problems and whites as valued citizens."²⁷ See, e.g., Dobbs v. Zant, 720 F. Supp. 1566, 1576-1578, 1576 n. 22 (N.D. Ga. 1989) (many white jurors who sentenced black man to death for murder of white victim demonstrated an "insensitivity to racial matters" and felt "races should mix to a limited extent only;" two jurors found blacks "scarier than whites" and two jurors admitted to using the slur "nigger").

27.

Davis, supra n. 15, 98 Yale L. Jou. at 1571. See also Johnson, Unconscious Racism and the Criminal Law, 73 Cornell L. Rev. 1016, 1020 n. 27 (1988) (describing persons in our society who "maintain a distance" between themselves and minorities and as a result are "less likely to feel empathy for minorities due to this distance.")

Questioning on voir dire may result in candid disclosures by some jurors of beliefs that "blacks are violence-prone or morally inferior" or "[f]ears of blacks," Turner v. Murray, 476 U.S. at 35, but will seldom uncover the extent to which the juror identifies with members of his own race over another race.²⁸

These factors have contributed to the remarkable disparity between imposition of the death penalty for murders of white and blacks. While the disparities standing alone may not be sufficient proof to establish a constitutional violation in a particular case, McCleskey v. Kemp, 481 U.S. 279 (1987), they nevertheless signal

28.

Nor will it identify one who "claims to accept egalitarian norms and behaves consistently with those norms in most situations[,]" but "reverts to traditional patterns of racial discrimination" when anger is aroused such as in white-victim cases. Johnson, supra n. 27, 73 Cornell L. Rev. at 1020 n. 27.

the very clear and present danger of these invidious factors influencing whether a crime will be punished by death.²⁹ They also underscore the constitutional necessity of the Court maintaining its "unceasing efforts" to eradicate racial prejudice from the process by requiring procedures which minimize the risk of race influenc-

29.

The magnitude of the danger is also indicated by the fact that four members of the Court concluded in McCleskey that race was playing an impermissible role in the process. Id. at 325 (Brennan, J., dissenting) ("the risk that race influenced McCleskey's sentence is intolerable by any imaginable standard"); 359 (Blackmun, J., dissenting) ("McCleskey's showing is of sufficient magnitude that, absent evidence to the contrary, one must conclude that racial factors entered into the decisionmaking process that yielded McCleskey's death sentence"); 366 (Stevens, J., dissenting) (observing "strong probability" that sentencing decision was influenced by race and that the "same outrage would not have been generated if he had killed a member of his own race.") Justice Marshall joined the dissents of Justice Brennan and Justice Blackmun.

ing the sentencing decision. Batson v. Kentucky, 476 U.S. at 80.

B. ADMISSION OF VICTIM WORTH EVIDENCE WOULD INCREASE THE INFLUENCE OF RACE AND STATUS ON THE SENTENCING DECISION

The admission of victim worth evidence would exacerbate the problem of race and socioeconomic status influencing the sentencing decision. Upon consideration of victim impact evidence, a jury would be authorized and encouraged to reject the death penalty for an aggravated murder involving a poor, unemployed -- often minority -- person but impose it in a less aggravated case of a prominent white person.

Prosecutors and juries could validly take into account the social and political standing of a victim of the crime in deciding whether to seek and impose the death penalty. See, e.g., Morris v.

Commonwealth, 766 S.W.2d 58, 61 (Ky. 1989) (prosecution brought out that victim's father and brother were both prosecutors); Vela v. Estelle, 708 F.2d 954, 962, 965, 966 (5th Cir. 1983) (prosecution presented the testimony of a "well-known professional football player" that victim was a star athlete and usher and choir member at his church to "encourage by jury to set punishment based on the goodness of the murder victim"), cert. denied, 464 U.S. 1053 (1984).

Prosecutors and juries would also be authorized to find that the lives of homeless people, prostitutes, the politically unpopular, or others who are different are not "worth" as much as other members of society. See, e.g., Belkin, Texas Judge Eases Sentence for Killer of 2 Homosexuals, N.Y. Times, Dec. 17, 1988, at § 1, at 8, col. 5 (thirty-year sentence for murders of two homosexuals explained

by: "I put prostitutes and gays at about the same level. And I'd be hard put to give somebody life for killing a prostitute.")³⁰

These concerns are not based on speculation, but on the cold hard reality that racial and class bias have not been eradicated from either American society or the criminal justice system. Overruling Booth would remove a significant protection against racial discrimination and allow race and social standing to play a greater and more explicit role in deciding who is sentenced to death. Such an outcome would be a major step backward toward an earlier time in our history when crimes were punished differently based

30.

See Brief Amici Curiae of Murder Victims' Families for Reconciliation, Ohio v. Huertas, No. 89-1944 at 32-36.

upon race of the victim³¹ and contrary to the purpose of the equal protection clause to protect equally the lives of all citizens.³²

Imposition of the death penalty based on ad hoc, subjective assessments of an individual's personal worth or the impact of the loss on a family is much different than the use of capital punishment to protect governmental functions and personnel, such as police officers and court officials,³³ or classes of persons with unique vulnerabilities, such as children and the elderly.

31.

See McCleskey v. Kemp, at 329-331 (Brennan, J., dissenting).

32.

For a discussion of the intent and purpose of the equal protection clause see Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, filed in South Carolina v. Gathers, 490 U.S. 805 (1989).

33.

See e.g., 18 U.S.C. §§ 351, 1111, 1751.

Providing for the death penalty in these latter situations comes well within the legislature's prerogative to carry out government functions and adopt objective classifications to protect its citizens. But no legislature has attempted to authorize the death penalty for the murders of "exemplary" citizens such as executives in large corporations, those in certain income brackets or people who are active in their churches.

Similarly, while legislatures may provide for different punishments depending on the result -- for example, whether a pedestrian was killed or the intersection was empty when a drunk driver went through a stoplight³⁴ or whether a gun

34.

Booth v. Maryland, 482 U.S. at 516 (White, J., dissenting), see also id., at 519 (Scalia, J., dissenting).

aimed at a guard fires or misfires³⁵ - - those distinctions do not turn on the worth and status of the victim involved. It is the loss of life when the car went through the stoplight or the gun was fired that should determine the enhanced punishment, not whether the victim was white or black, prosperous or poor, well respected or generally disliked, religious or not religious, single or a parent of four.

As Justice Powell wrote for the Court in Booth: "We are troubled by the implication that defendants whose victims are assets to the community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system does not tolerate such distinctions." Booth v. Maryland,

35.

Id., 482 U.S. at 519 (Scalia, J., dissenting).

482 U.S. at 506 n. 8. So long as the system rests on the fundamental premise of political equality for all, that intolerance should be maintained.

CONCLUSION

Because Booth and Gathers are indispensable to minimizing the risk of racial and class influence on the capital sentencing process and providing equal protection for all life, those decisions should be reaffirmed.

Respectfully submitted,

STEPHEN B. BRIGHT*
83 Poplar Street
Atlanta, GA 30303
(404) 688-1202

J. L. CHESTNUT
Chestnut, Sanders,
Sanders,
Turner, Williams &
Pettaway
P. O. Box 1305
Selma, AL 36701
(205) 875-2964

JOHNNIE E. WALLS
P. O. Box 634
Greenville, MS 38701
(601) 335-6001

Counsel for Amicus Curiae

* Counsel of Record

March 18, 1991.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

APR 4 1991

1991

OFFICE OF THE CLERK

PERVIS TYRONE PAYNE,
Petitioner,

STATE OF TENNESSEE,
Respondent.

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE**

**BRIEF OF AMICUS CURIAE,
STATE OF CALIFORNIA,**

Joined by the States of Alabama, Arizona, Colorado, Connecticut, Florida, Indiana, Kentucky, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota and Washington, in support of the State of Tennessee, Respondent.

**DANIEL E. LUNGEN, Attorney General
of the State of California**

**GEORGE WILLIAMSON, Chief Assistant
Attorney General - Criminal Division**

**HARLEY D. MAYFIELD, Senior Assistant
Attorney General**

**FREDERICK R. MILLAR, JR.
Supervising Deputy Attorney General**

**LOUIS R. HANOIAN
Deputy Attorney General**

**110 West A Street, Suite 700,
San Diego, California 92101
Telephone: (619) 237-7281**

*Counsel for Amicus Curiae
State of California*

QUESTION PRESENTED

- I. Should *Booth v. Maryland*, 482 U.S. 496 (1987), and
South Carolina v. Gathers, 490 U.S. 805 (1989), be
overruled?

TOPICAL INDEX

QUESTION PRESENTED	i
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
<i>BOOTH V. MARYLAND AND SOUTH CAROLINA V. GATHERS SHOULD BE OVERRULED BECAUSE THE IMPACT OF A CAPITAL CRIME ON THE VICTIM, THE VICTIM'S SURVIVORS AND SOCIETY IS PROPERLY CONSIDERED IN DETERMINING WHETHER DEATH IS THE APPROPRIATE PUNISHMENT</i>	5
A. The Punishment Should Fit The Crime	6
B. The People Have A Right To A Balanced Penalty Proceeding	10

TOPICAL INDEX (cont'd)

	<u>Pages</u>
C. Evolving Societal Standards Allow Victim Impact	14
D. The Confusion Caused By Booth and Gathers Justifies Overruling Those Decisions	16
E. The Concerns Underlying The Booth Decision Did Not Warrant The Establishment Of The Rule Nor Do They Support Its Retention	17
1. Victim Characteristics	17
2. Defendant's Intent	19
3. Defendant's Inability to Rebut Victim-Impact Evidence	21
4. The Mini-Trial	21
CONCLUSION	23

TABLE OF AUTHORITIES

CASES	Page
<i>Booth v. Maryland</i> (1987) 482 U.S. 496	5, 7-9, 12-17, 20, 21, 23
<i>Coker v. Georgia</i> (1977) 433 U.S. 584	10
<i>Eddings v. Oklahoma</i> (1982) 455 U.S. 104	11
<i>Enmund v. Florida</i> (1982) 458 U.S. 782	8, 10
<i>Fay v. New York</i> (1947) 332 U.S. 261	11
<i>Furman v. Georgia</i> (1972) 408 U.S. 238	8, 23
<i>Gardner v. Florida</i> (1977) 430 U.S. 349	21
<i>Gregg v. Georgia</i> (1976) 428 U.S. 153	6, 7, 14, 23
<i>Jackson v. Denno</i> (1968) 378 U.S. 368	11
<i>Lockett v. Ohio</i> (1978) 438 U.S. 586	11, 22

TABLE OF AUTHORITIES - Continued

	<u>Page</u>
<i>McGautha v. California</i> (1971) 402 U.S. 183	21
<i>Mills v. Maryland</i> (1988) 486 U.S. 367	9
<i>Murray v. Giarratano</i> (1989) 492 U.S. ____ [106 L.Ed.2d 1]	7 ¹
<i>People v. Clark</i> (1990) 50 Cal.3d 583	17
<i>People v. Harris</i> (1984) 36 Cal.3d 36	12
<i>People v. Siripongs</i> (1988) 45 Cal.3d 548	15
<i>Roberts v. Louisiana</i> (1977) 431 U.S. 633	19
<i>Sawyer v. Smith</i> (1990) 497 U.S. ____ [111 L.Ed.2d 193]	7
<i>Skipper v. South Carolina</i> (1986) 476 U.S. 1	11
<i>Smith v. Murray</i> (1986) 477 U.S. 527	7
<i>Snyder v. Massachusetts</i> (1934) 291 U.S. 97	11

TABLE OF AUTHORITIES - Continued

	<u>Page</u>
<i>Zant v. Stephens</i> (1983) 462 U.S. 862	8, 18
CONSTITUTIONAL PROVISIONS	
California Constitution	
Article I, § 28	14
Article I, § 28, subd. (a)	14
Eighth Amendment	5, 6, 8, 14
Fourteenth Amendment	8
Proposition 8	14, 15
STATUTES	
California Evidence Code	
§ 350	22
§ 351	22
§ 352	22
California Penal Code	
§ 190.2, subd. (a)(7)	19
§ 190.2, subd. (a)(9)	19
§ 190.2, subd. (a)(11)	19
§ 190.2, subd. (a)(13)	19
§ 190.2, subd. (a)(16)	18
§ 190.3, subd. (a)	19
§ 1191.1	15
Federal Rules of Evidence	
rule 403	22

INTEREST OF AMICI CURIAE

Society in general and legislative bodies in particular have a significant interest in defining the bases upon which criminal defendants will be punished. All states attempt to make the punishment fit the crime and the offender. In California, as in other jurisdictions with capital punishment, the circumstances of the crime are a proper subject of evidence and argument in the penalty phase. They help define the extent of harm caused by the defendant. However, the harm caused by a capital murder extends beyond the historical circumstances of the offense. Society is injured and the survivors of the victim are harmed as well. Amici have an interest in insuring that the Constitution is not interpreted to preclude the full extent of the harm caused by a murderer to be considered by a penalty phase jury.

The Court's decisions in *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989), limit use of victim-impact evidence in a capital trial. The Court has severely restricted the jury's consideration of aspects of the crime that deserve consideration in determining whether death is the appropriate punishment, by prohibiting the prosecution from establishing all relevant evidence for determining penalty. The result has tipped the scales of fairness against the State.

The contrast can be seen in the decisions of the California Supreme Court which have consistently followed the broad definition given defense mitigating evidence in cases such as *Lockett v. Ohio*, 438 U.S 586, 604 (1978) (plurality), going so far as to rule it was reversible error to refuse to admit the defendant's poetry in mitigation. (*People v. Harris*, 36 Cal.3d 36, 67-71 (1984) (plurality).) Amici have an interest in having the proper balance returned. The balance can be reestablished by overruling *Booth* and *Gathers*.

Additionally, amici have an interest in the establishment of clear and workable constitutional rules. The rule in *Booth* has engendered considerable confusion among prosecutors and courts concerning the permissible scope of evidence and argument involving personal characteristics of the victim. For example, the California Supreme Court has found certain evidence relevant to show the victim did not resist, because lack of resistance relates to the circumstances of the crime. (*People v. Carrera*, 49 Cal.3d 291, 336-337 (1989).) However, given the Court's broad reading of *Booth* in *Gathers*, and the breadth of any decision which would define any error in this case as *Booth* error, decisions like *Carrera* would be vulnerable to attack in federal habeas corpus.

Expansive interpretations of *Booth* have been advocated by counsel for capital defendants. In *People v. Karis*, 46 Cal.3d 612, 640, 641 (1988), the defendant argued *Booth* precluded testimony in aggravation by a victim of a prior offense committed by defendant on the ground it was inflammatory in the same way testimony by the victim's family was inflammatory. The California Court rejected this contention on the ground the impact of a capital defendant's crimes on the victims of those crimes is relevant to the penalty determination. (*Id.*, at p. 641.) Yet, similar testimony was found improper in *People v. Boyde*, 46 Cal.3d 212, 249 (1988), fn. 5. (aff'd on different grounds *Boyde v. California*, ____ U.S. (1990), [108 L.Ed.2d 316]); see also *People v. Clark*, 50 Cal.3d 583, 612, 629 (1990) (admission of evidence of victim-impact held to be erroneous, but harmless, even though defendant committed crime to specifically make surviving victim suffer because of her professional status and professional relationship with the defendant).

Other states have had as difficult a time as California divining the meaning of *Booth*. (See *Gathers*, *supra*, 490 U.S. at p. 813 (O'Connor, J., dissenting); *State v. Huertas*, 553 N.E.2d 1058, 1070 (Ohio 1990) (Moyer

C.J., concurring) ("The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area.").

SUMMARY OF ARGUMENT

A fundamental precept of justice is that the punishment fit the crime. (*Weems v. United States*, 217 U.S. 349, 367 (1910).) In this country, that principle has been expanded to allow the punishment to fit the crime and the offender. (*Williams v. New York*, 337 U.S. 241, 247 (1949).) The Court's decisions in *Booth* and *Gathers* prevent consideration of the full impact of a capital murderer's crime, which impacts not only the murdered individual but society and surviving family members. Thus, the picture presented to the sentencing authority in a capital case is distorted because the offense to society is never fully defined. Absent full definition of the harm caused by defendant's actions, his or her "blameworthiness" cannot be assessed.

Equally fundamental to justice is the idea that both parties are entitled to due process. (*Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).) The rule which emerged from *Booth* unfairly tips the scales in favor of the defendant in a capital penalty trial. Any aspect of the offense or defendant's character or record which the defendant wishes to offer as a basis for a sentence less than death must be received in evidence. (*Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality).) In contrast, *Booth* and *Gathers* prevent the prosecution from presenting any evidence about the victims or even arguing the "humanity" of the victims thereby exposing the jury to the full degree of harm caused by the defendant.

Society has evolved to the point where the rights of victims are recognized on an increasing basis in the

criminal justice system. *Booth* has relegated the victim of a capital crime to a faceless, undifferentiated mass contrary to evolving standards of decency. (See, *Trop v. Dulles*, 356 U.S. 86, 101 (1958).) Since *Booth* is contrary to contemporary standards, this too should serve as a basis to abandon its reasoning.

The considerable confusion created by *Booth* serves as another basis for overruling the decision. (*Vasquez v. Hillery*, 474 U.S. 254, 266 (1986).) In footnote 10 of the opinion, the Court stated there could be situations where victim impact evidence was admissible because it related directly to the circumstances of the offense. (*Booth v. Maryland*, *supra*, 482 U.S. at p. 507, fn. 10.) Yet, in *Gathers* the Court held it was error for the prosecutor to argue personal characteristics of the victim which were properly admitted in evidence. (*Gathers*, *supra*, 490 U.S. at pp. 811-812.) Moreover, as noted in Justice O'Connor's dissent in *Gathers*, states have had great difficulty understanding and applying the *Booth* rule. (*Gathers*, *supra*, 490 U.S. at p. 813 (O'Connor, J. dissenting).)

The underpinnings of the *Booth* decision do not justify retention of the rule. Contrary to the assumption in *Booth*, the harm to society may be greater depending upon the characteristics of the victim. The murder of a police officer, parent or child harms society more than the murder of a drug dealing child molester.

Although a murderer may not intend to kill to harm society or the victim's survivors, his or her intent is not the only consideration in deciding the appropriateness of the death penalty. (See, *Tison v. Arizona*, 481 U.S. 137, 150-151 (1987) ("reckless indifference" to human life sufficient mental state to impose the death penalty).)

While the decision whether to challenge victim impact evidence may prove a tactical problem for a defendant, such difficulty does not constitute sufficient reason to create or retain the exclusionary rule of *Booth*.

so long as the defendant is allowed an opportunity to rebut the evidence. (See *McGautha v. California*, 402 U.S. 183, 213 (1971).)

Finally, the concern that victim impact information will create distracting "mini-trials" is based on a false assumption, that is, that victim impact evidence is irrelevant. If the legislative body determines such evidence is relevant to the penalty determination, its consideration is not the least bit distracting.

Consequently, amici submit *Booth* and *Gathers* should be reexamined and overruled, as an incorrect statement of Eighth Amendment requirements.

BOOTH V. MARYLAND AND SOUTH CAROLINA V. GATHERS SHOULD BE OVERRULED BECAUSE THE IMPACT OF A CAPITAL CRIME ON THE VICTIM, THE VICTIM'S SURVIVORS AND SOCIETY IS PROPERLY CONSIDERED IN DETERMINING WHETHER DEATH IS THE APPROPRIATE PUNISHMENT

In *Booth v. Maryland*, 482 U.S. 496 (1987), the Court held it was a violation of the Eighth Amendment for a jury to consider a statutorily required victim impact statement at the sentencing phase of a capital trial. In *South Carolina v. Gathers*, 490 U.S. 805 (1989), the Court applied *Booth* to hold it was reversible error for the prosecutor to comment about the victim's personal characteristics in his argument to the jury. (*Booth, supra* at p. 507, fn. 10; *Gathers, supra* at p. 811.)

Amici respectfully urge the Court to reconsider and overrule *Booth* and *Gathers*. The holdings in those cases are contrary to the cornerstones of criminal sentencing jurisprudence in general and capital sentencing in particular. *Booth* and *Gathers* distort the

process by which a penalty phase jury reaches its decision by unfairly skewing the proceeding in favor of the defendant. The decisions are incapable of consistent application or definition. Moreover, the decisions deprive the legislative body of the right to define what evidence a jury should consider in determining the appropriate punishment for a person convicted of a capital offense.

A. The Punishment Should Fit The Crime

Two thousand years ago Cicero stated, "*Noxiae pena par esto*" (Let the punishment match the offense). (Cicero, *De Legibus*, III, 20.)¹ In an early interpretation of the Eighth Amendment, the Court recognized the fundamental nature of Cicero's observation when it stated, "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." (*Weems v. United States*, 217 U.S. 349, 367 (1910).) The notion the punishment should fit the offender as well as the crime is of modern vintage. (*Williams v. New York*, 337 U.S. 241, 247 (1949).) Until *Booth*, severity of the crime remained a legitimate basis upon which to analyze the excessiveness of a particular sentence. (*Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.).) There is nothing inherently contradictory in fitting punishment to the crime and the

¹In Act II of Gilbert and Sullivan's *The Mikado*, Cicero's axiom is restated:

"My object all sublime
"I shall achieve in time--
"To make the punishment fit the crime."

offender.²

Society permits the ultimate punishment because of the enormity of the loss and the outrageous nature of the offense. Capital punishment is an expression of society's moral outrage at particularly offensive conduct. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 183 (opinion of Stewart, Powell, and Stevens, JJ).) Punishment which fits the crime is inherent in an ordered society.

"The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to

²*Booth* recognized this proposition in footnote 12. (*Booth*, *supra* at p. 509, fn. 12.) Although it expressed no opinion on the use of victim impact information in contexts other than capital cases, the Court recognized the widespread use of victim information in such cases. Thus, the sentencing process in virtually all jurisdictions allows the sentencing authority to impose a punishment which fits both the crime (with full knowledge of the extent of harm caused by the defendant) and the offender.

The Court attempted to distinguish such a sentencing model from capital cases on the rationale that "death is different." Recognizing the statement as a truism, there is no legitimate reason to treat death cases differently from other criminal cases by creating a separate constitutional jurisprudence for such cases. While the Court may have good reason to examine death penalty cases closely to see that constitutional rights have not been violated, there is nothing in the Constitution which requires or allows different constitutional rules for capital cases. (See *Sawyer v. Smith*, 497 U.S. __ [111 L.Ed.2d 193, 211-212] (1990) (same retroactivity rules apply to capital and non-capital habeas); *Murray v. Giarratano*, 492 U.S. __ [106 L.Ed.2d 1, 10-11] (1989) (plurality) (no requirement for states to appoint counsel in state collateral review of capital cases); *Smith v. Murray*, 477 U.S. 527, 538 (1986) (same procedural default rules apply in capital cases as in non-capital cases).)

believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy--of self-help, vigilante justice, and lynch law." (*Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).)

The majority in *Booth* took a novel approach to the penalty equation. In analyzing the jury's penalty phase task the Court referred to the *individualized* determination whether a capital defendant should face the death penalty based on the character of the individual and the circumstances of the crime. (*Booth v. Maryland*, *supra*, 482 U.S. at p. 502; *Zant v. Stephens*, 462 U.S. 862, 879 (1983).) It expressly recognized the Court had never said the defendant's record, characteristics and the immediate circumstances of the crime were the only permissible sentencing considerations. However, other factors must be scrutinized to ensure the evidence has some bearing on defendant's "personal responsibility and moral guilt." (*Booth, supra* at p. 502; *Enmund v. Florida*, 458 U.S. 782, 801 (1982).)

The majority viewed evidence concerning the victim and the impact of his/her death on surviving family members and society in general to be irrelevant in assessing the "blameworthiness of a particular defendant" and held, subject to narrowly defined exceptions, that the prosecution may not introduce such evidence before a penalty phase jury. (*Booth, supra* at pp. 504, 507, fn. 10.)

The *Booth* Court spotlighted the defendant to the exclusion of the circumstances and consequences of the crime. This view of the process is distorted and must be brought back into focus. The majority's conclusion seems to be more a subjective conclusion about probative value than one supported by Eighth or Fourteenth Amendment

jurisprudence.³

Contrary to the *Booth* majority's unprecedented view of the jury's penalty phase task, the damage caused by a murderer is not limited to the unspeakable acts committed against the victim. "[A] victim's community is also injured, and in particular the victim's family suffers shock and grief of a kind difficult even to imagine for those who have not shared a similar loss." (*Booth, supra* at p. 515 (White, J., dissenting); see too, *id.* at p. 519 (Scalia, J., dissenting); *Gathers, supra*, 490 U.S. at p. 814 (O'Connor, J., dissenting); *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting).)

Allowing the sentencing authority to have a complete view of the damage done by a murderer's actions fulfills the policy of fitting the punishment to the crime and the offender. The prosecution should be allowed to fully define the crime so the jury may assess the relative "blameworthiness" of the defendant. In a dissenting opinion in *State v. Huertas*, 553 N.E.2d 1058 (Ohio 1990), a case wherein certiorari was originally granted by the Court and subsequently dismissed January 22, 1991, (*Ohio v. Huertas*, 498 U.S. ____ [112 L.Ed.2d 837]), Justice Resnick of the Ohio State Supreme Court

³In his dissent in *Gathers*, Justice Scalia discussed the underlying basis of the *Booth* decision and concluded:

"*Booth* has not even an arguable basis in the common-law background that led up to the Eighth Amendment, in any longstanding societal tradition, or in any evidence that present society, through its laws or actions of its juries, has set its face against considering the harm caused by criminal acts in assessing responsibility. The Court's opinion in *Booth*, like today's opinion, did not even try to assert the contrary. We provide far greater reassurance of the rule of law by eliminating than by retaining such a decision." (*Gathers, supra*, 490 U.S. at p. 825 (Scalia, J., dissenting).)

stated:

"[T]he conscience of the community cannot properly be expressed if the sentencing authority lacks knowledge of the effect the defendant's crime had on the community and especially the family, friends and associates of the victim." (*States v. Huertas, supra*, 553 N.E.2d at p. 1072 (Resnick, J., dissenting).)

This Court should not preclude the sentencing authority from considering the whole of the loss.⁴ The Constitution does not require the limited approach of *Booth*.

B. The People Have A Right To A Balanced Penalty Proceeding

Another cornerstone of criminal jurisprudence is the view that both sides are entitled to due process of

⁴In fact, analysis of the loss is mandatory in capital cases. Capital punishment may not be inflicted for certain crimes because those crimes do not possess the necessary degree of injury to the person and the public. (*Coker v. Georgia*, 433 U.S. 584, 598 (1977) (opinion of White, J.) (rape of adult woman); *Enmund v. Florida, supra*, 458 U.S. 782, 797 (armed robbery).) However, notwithstanding the defendant's mental state, the death penalty may be constitutionally imposed on the actual killer based on the fortuity that a crime victim dies. (*Tison v. Arizona*, 481 U.S. 137, 148 (1987) (robbery-murder).) Victim impact does make a difference.

Furthermore, if the consequences of a crime to the immediate victim are relevant to punishment, the Constitution must not prohibit a State or Congress from attaching significance to the impact of a murder on surviving family members or society. Young Nicholas Christopher was as much a victim as his dead mother and sister. The impact of this crime on Nicholas should not be deemed irrelevant in the constitutional sense.

law. Justice Cardozo stated for the Court:

"But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (*Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).)

This Court has repeatedly upheld the People's right to due process. In *Fay v. New York*, 332 U.S. 261 (1947), in holding that a defendant is entitled to a neutral jury as opposed to a friendly jury, the Court expressly stated society has a right to a fair trial. (*Id.*, at pp. 288-289.) In repudiating the use of technical loopholes for the guilty to go free, the Court reiterated that the People of the State are entitled to due process. (*Stein v. New York*, 346 U.S. 156, 196-197 (1953), (overruled on other grounds in *Jackson v. Denno*, 378 U.S. 368 (1968).) In *United States v. Nixon*, 418 U.S. 683 (1974), a unanimous Court found the very integrity of the judicial system depended upon full access to evidence by either side. (*United States v. Nixon*, *supra* at p. 709.) The lesson is clear: hearings wherein only one side is entitled to present evidence and argument are antithetical to simple fairness.

The Court has consistently required a penalty phase jury be allowed to consider a wide range of information concerning the background of the defendant. The sentencer may not be precluded from considering, as a mitigating factor, any aspect of the offense or a defendant's character or record that the defendant proffers as a basis for a sentence less than death. (*Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality); see also *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).) In California, for example, the California Supreme Court held it was error to exclude a defendant's poetry because it constituted

mitigation. (*People v. Harris*, 36 Cal.3d 36, 67-71 (1984) (plurality).)

In contrast, *Booth* and *Gathers* prevent the prosecution from presenting evidence about the victims or arguing the humanity of the victims and thus fully exposing the jury to the actual harm resulting from the defendant's act. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced. (*Booth, supra*, 482 U.S. at p. 520 (Scalia, J., dissenting).)

The instant case exemplifies the inequity. Payne introduced the testimony of a friend from "church" who characterized him as a very caring person who helped get her life in order. Payne's friend offered that he was not an abuser of drugs or alcohol and it was inconsistent with his character to have committed these offenses. Payne's parents both testified to his good character and a clinical psychologist testified Payne was "mentally handicapped." (*State v. Payne*, 791 S.W.2d 10, 17 (Tenn. 1990).) In contrast, the State asked a single question about the effect Payne's crime had on Nicholas Christopher, who was himself a victim of Payne's brutality.⁵ This, petitioner claims, constituted the

⁵The following question serves as the basis for petitioner's claim:

"Q. Ms. Zvolanek [Nicholas's grandmother], how has the murder of Nicholas's mother and sister affected him?

"A. He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie.

(continued...)

violation of *Booth*. The Tennessee Supreme Court below characterized the inequity of *Booth* and *Gathers* by stating:

"It is an affront (sic) to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims." (*State v. Payne, supra*, 791 S.W.2d at p. 19.)

Another example clearly illustrates the unfairness of the current rule. A defendant may introduce testimony from a member of the victim's family, who for religious or other reasons, urges the jury to spare defendant's life. Trial courts feel compelled under *Lockett* and *Skipper* to allow such testimony. However, should the prosecution wish to rebut such testimony with victim impact evidence from other family members who do not share the desire to spare the defendant's life (even without expression of their opinion on the question of punishment), such evidence may be inadmissible under *Booth*.

The Court should permit the States and Congress to allow each party an equal opportunity to address the issue of appropriate punishment. If the penalty is constitutional, as the Court has repeatedly held, it cannot be unconstitutional to permit the pros and cons in the particular case to be heard. (*Booth, supra*, 482 U.S. at pp. 520-521 (Scalia, J., dissenting).)

And I tell him yea. He says, I'm worried about my Lacie." (State Transcript pp. 1504-1505.)

C. Evolving Societal Standards Allow Victim Impact

Other considerations which help give meaning to the Eighth Amendment are "the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, 356 U.S. 86, 101 (1958) (opinion of Warren, C.J.); *Gregg v. Georgia*, *supra*, 428 U.S. at p. 173 (opinion of Stewart, Powell, and Stevens, JJ.).) Whether by legislation or initiative, numerous states and the federal government have provided a mechanism whereby victims of crime and their families have a place in the criminal justice system. (See, *Booth*, *supra* at p. 509, fn. 12.)⁶

⁶On June 8, 1982, the People of the State of California amended the state constitution by passing Proposition 8, "The Victims' Bill of Rights." (Cal. Const., art. I, § 28.) In article I, section 28, subdivision (a), the California Constitution now reads:

"The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern.

"The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.

"Such public safety extends to public primary, elementary, junior high, and senior high school campuses,

(continued...)

This legislative change is a response to a perception by society that the criminal justice system has meticulously respected the rights of a criminal defendant and expanded those rights, all the while ignoring the rights of the victim. The holding in *Booth* and its application in *Gathers* is the ultimate slap in the face to society and the survivors of the victim. Through those decisions, the victim is not treated as the uniquely individual human being he or she was, but as a member of a faceless, undifferentiated mass known as "victim." (Compare, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.).) To strip victims of their dignity and humanity by relegating them to objects of no great significance is in violation of standards of decency. Consequently, evolving community standards cut strongly in favor of the elimination of *Booth* and *Gathers*.

where students and staff have the right to be safe and secure in their persons.

"To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives."

California Penal Code section 1191.1 is a consequence of Proposition 8. Section 1191.1 gives a crime victim, or certain members of the victim's family if the victim is a child or deceased, a right to attend and be heard at criminal sentencing proceedings in non-capital cases. (See, *People v. Stripongs*, 45 Cal.3d 548, 585-586, (1988) fn. 12.)

As recognized by the Court in *Booth*, the vast majority of States and the federal government have legislation which permits the use of victim impact information in some contexts. (*Booth, supra*, 482 U.S. at p. 509, fn. 12.) Without question, society has evolved to the point where victims have rights in the criminal justice system.

D. The Confusion Caused By Booth and Gathers Justifies Overruling Those Decisions

Booth should be overruled because the holding is so broad as to defy consistent application. *Booth* involved a minutely detailed, statutorily required Victim Impact Statement (VIS) which was presented to the jury. The VIS described the personal characteristics of the victims, the impact of the crimes on their surviving family, and included the family members' opinions and characterizations of the crimes and defendant. (*Booth, supra* at pp. 502-503, 509-515.)

In footnote 10 of the opinion (*Booth, supra* at p. 507), the Court stated that general disapproval of victim impact statements in a capital sentencing proceeding did not mean such evidence would never be relevant. Victim impact information could be admissible because it relates directly to the circumstances of the crime. It might be admissible where the victim's personal characteristics are relevant to rebut an argument offered by the defendant. (*Ibid.*) Thus, *Booth* presents a rule of exclusion with a potential plethora of exceptions and little guidance on the boundaries of the rule. In the short time since *Booth* was decided, it has already caused great confusion.

Notwithstanding footnote 10 in *Booth*, the Court in *Gathers* refused to uphold comments by the prosecutor about the victim of a crime even though those comments were based on evidence about the victim and his background which was properly admitted before the jury. *Gathers* appears to have extended *Booth* to prohibit discussion of admissible trial evidence. The result is plainly inconsistent with footnote 10 of *Booth* because the argument was directly related to the circumstances of the crime. Thus, *Gathers* added to the confusion created by *Booth* by prohibiting that which *Booth*, in footnote 10, appeared to expressly permit.

State v. Huertas, supra, 553 N.E.2d 1058, is itself

an example of the confusion caused by *Booth*. Chief Justice Moyer of the Ohio Supreme Court stated, "The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area." (*State v. Huertas, supra*, 553 N.E.2d at p. 1070 (Moyer, C.J., concurring).) Justice O'Connor's dissent in *Gathers* presented additional examples of the confusion begat by *Booth*. (*Gathers, supra* at p. 813 (O'Connor, J., dissenting).) Another graphic example is provided by the California Supreme Court, which held it was error (albeit harmless) to admit evidence of the impact of a murder on the victim's family where the victim was killed because the defendant wanted the victim's wife to suffer because of her professional status and professional relationship with the defendant. (*People v. Clark*, 50 Cal.3d 583, 612, 629 (1990).)

The inability to accurately define the rule has caused lower courts to give an overly expansive meaning to *Booth* which makes rational application of the rule perplexing, if not impossible. A rule of constitutional law which breeds confusion or peculiar results should be overruled. (*Vasquez v. Hillery*, 474 U.S. 254, 266 (1986).) *Booth* created such a rule.

E. The Concerns Underlying The Booth Decision Did Not Warrant The Establishment Of The Rule Nor Do They Support Its Retention

I. Victim Characteristics

The *Booth* Court was troubled by the implication that defendants whose victims were "assets" to their community are more deserving of punishment than those whose victims are perceived to be less worthy. (*Booth, supra*, 482 U.S. at p. 506, fn. 8.)

To the extent the Court was concerned a

sentencing body would be encouraged to rely on unconscionable factors such as race, religion or political affiliation of the victim in the sentencing decision, such concern is unwarranted. Without question the State may not rely on such factors in determining whether the death penalty is appropriate for the same reasons the State may not urge the death penalty because of the race, religion or political affiliation of the defendant. (*Zant v. Stephens, supra*, 462 U.S. at p. 885; *Gathers, supra*, 490 U.S. at pp. 821-822 (O'Connor, J., dissenting).)⁷

Contrary to the majority's analysis in *Booth*, there is reason to conclude some murders are more harmful to society than others. While on one level society is diminished equally by the loss of any human life, on another, more concrete level, the harm and disruption to society may be greater depending upon who is killed. For example, the harm to society by the assassination of the President of the United States, the murder of a teacher, a parent of twelve or a young child is immeasurably greater than the harm to society caused by the murder of a drug dealer in a dope deal gone sour.

Certainly the killer of the President, who has caused the country to come to halt, created potential national security problems, and has disenfranchised many voters has caused more harm and deserves greater moral condemnation than one who kills an ordinary citizen, even though both murders were premeditated and carried out under identical circumstances.

Additionally, under California law the status of the victim is an element of many special circumstances

⁷This situation differs from a statute which allows imposition of the death penalty where the defendant commits an *intentional killing because of* the victim's race, color, religion, national origin or other similar factor. (See, Cal. Pen. Code, § 190.2, subd. (a)(16).)

used to limit the category of first degree murderers eligible for the death penalty. For example, special circumstances include intentional killing of a federal law enforcement officer, fireman, or a peace officer while engaged in the performance of his duties. (Cal. Pen. Code, §§ 190.2, subd. (a)(7)-190.2, subd. (a)(9).) Other special circumstances relate to the killing of a prosecutor, judge or elected or appointed official where the killing was carried out in retaliation for or to prevent the performance of the victim's official duties. (Cal. Pen. Code, §§ 190.2, subd. (a)(11)-190.2, subd. (a)(13).) These special circumstances in turn are circumstances of the crime relating to the victim that are considered by the jury in making the penalty determination. (Cal. Pen. Code, § 190.3, subd. (a).)

If *Booth* were carried to its extreme these special circumstances and others like them, which were designed to protect persons from becoming victims because of their position and because of the special outrage that arises from these murders, could be brought into question because they relate to characteristics of the victim. However, the Court's prior decisions never suggested such a result. (*Roberts v. Louisiana*, 431 U.S. 633, 636 (1977) ("... the fact the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance.") While it may be possible to distinguish between a victim's status as a police officer and other facts, the constitutional basis for drawing such distinctions is difficult to discern.

2. Defendant's Intent

Another concern of the *Booth* majority pertained to blameworthiness as it relates to the defendant's intent. The Court stated the defendant often will not know the victim or have any knowledge of the characteristics of his/her family. Therefore, matters pertaining to the

victim do not relate to the defendant's blameworthiness. (*Booth, supra*, 482 U.S. at pp. 504-505.) However, as argued in some detail above, there is nothing that offends sensibilities by holding a murderer accountable not only for his/her state of mind, but for the full extent of harm caused. (See, *Booth, supra* at p. 516 (White, J., dissenting.)

For example, though they share identical intents, one who drives while under the influence and kills someone in a traffic accident faces a more severe moral judgment and criminal punishment than one who simply drives under the influence. Similarly, one who purposefully sets fire to a barn and unintentionally kills two people in the barn is subject to graver punishment and moral judgment than one who purposefully burns an empty barn. In these circumstances, and many others, the criminal law looks at the actual consequences of the act, not just the knowledge or intent of the defendant. (See, *Tison v. Arizona*, 481 U.S. 137, 150-151 (1987) (although defendants did not kill or intend to kill, their "reckless indifference" to human life allowed imposition of the death penalty).) Given this reality, there is no compelling reason why a trier of fact in a capital case should not be allowed to consider the impact on the victim, his or her family, and society caused by a murder regardless of defendant's knowledge or intent.

Of course, defendant's intent should not be ignored. If the defendant intended to murder because of knowledge of the victim and his/her family that may aggravate the case further. Likewise, if he did not intend such harm to occur, he may argue his lack of intent as a circumstance in mitigation. However, intent to harm is not a predicate for aggravation.

3. Defendant's Inability To Rebut Victim-Impact Evidence

Another concern of the Court involved a defendant's difficulty in successfully rebutting victim impact evidence because it might not sit well with the trier of fact. (*Booth, supra*, 482 U.S. at pp. 506-507.) The fact it might not be prudent to rebut victim impact evidence for tactical reasons is not a justification for making the evidence inadmissible, nor does it diminish its probative value. If a defendant chooses not to rebut it for tactical reasons that is his choice. The Constitution does not shield a defendant from making difficult choices. (*McGautha v. California*, 402 U.S. 183, 213 (1971).) So long as a defendant is given an opportunity to rebut the evidence, there is no constitutional infirmity to the admission of the evidence. (*Gardner v. Florida*, 430 U.S. 349, 362 (1977) (opinion of Stevens, J.).)

The prosecution is faced with a similar problem in a penalty trial and the Court has not expressed the same concern. In many capital cases the defense will call the defendant's mother or father to tearfully describe defendant's difficult life and beg the jury to spare defendant's life. Often the prosecution, for tactical reasons, does not cross-examine the parent for fear of a negative impact on the jury. Thus, the fact the defendant has difficult choices to make in rebutting evidence simply places him in the same position as the State. (See, *Booth, supra* at p. 518, fn. 3 (White, J., dissenting).)

4. The Mini-Trial

The *Booth* Court also expressed concerns that a mini-trial involving victim impact would be "unappealing" and would distract the jury from its task of determining the appropriate penalty. (*Booth, supra*, 482 U.S. at p.

507.) While litigation involving victim impact might be "unappealing," there is no portion of a capital trial which is appealing. Unpleasantness is inherent in the crime and its consequences.

The concern that the jury would be distracted from its proper goal by the introduction of victim impact evidence is based on a false assumption. The Court assumed victim impact evidence was irrelevant and thus a distraction. However, if the legislative body has determined that victim impact evidence is relevant to a jury's penalty decision, its introduction would not be a distraction, but an important consideration for the jury. Introduction of victim impact evidence, even if unrelated to the historic circumstances of the offense, causes no more distraction than a defendant's introduction of character evidence.

Once the legislature has defined the permissible boundaries of victim impact evidence the trial court is empowered to ensure the evidence is not too far removed from these issues. (See e.g. *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, fn. 12 (State courts maintain the traditional authority to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense); see Cal. Evid. Code, §§ (Irrelevant evidence is inadmissible).)⁸

Even if prosecutors are permitted to introduce victim impact evidence in the penalty phase, tactical considerations will play a major role in circumscribed use of such evidence. As the majority recognized in *Booth*, discussions of victim impact may be unappealing. By

⁸California courts also have the discretion to exclude evidence that is relevant if its probative value is substantially outweighed by the probability that its admission will necessitate the undue consumption of time or create substantial danger of prejudice, confusing the issues, or misleading the jury. (Cal. Evid. Code, § 352; see, Fed. Rules of Evid., rule 403.)

placing too much emphasis on victim impact, a prosecutor may end up with a hostile jury. Juries come into a penalty trial aware that a brutal murder likely had a devastating impact on surviving family members and possibly on the community. (See, *Booth, supra* at p. 508 (jurors aware of grief and anger of family).) A disproportionate emphasis on these facts may alienate the jury by dwelling on the obvious.

To have stated this proposition is not to suggest such evidence (or argument based on these factors) should be inadmissible. On the contrary, because jurors *are* aware of these facts evidence and argument about victim impact *should* be admissible. If jurors think about such things, the parties should be permitted to address these factors with evidence and argument. Only by bringing these issues into the open can the trial court regulate the process to insure information is properly considered by the jury. In so doing, the accuracy of the penalty process is enhanced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that *Booth* and *Gathers* should be overruled because they have precluded penalty phase jurors from considering information which directly relates to the extent of harm caused by defendant's acts. "We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." (*Gregg v. Georgia, supra*, 428 U.S. at p. 205 (opinion of Stewart, Powell, and Stevens, JJ).)

As Justice Blackmun was moved to observe in his dissenting opinion in *Furman v. Georgia, supra*, 408 U.S. at pp. 413-414:

"It is not without interest, also, to note that, although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of those opinions makes reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously devoid of any reference to the victims. There is risk, of course, in a comment such as this, for it opens one to the charge of emphasizing the retributive. (Citation.) Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked . . ."
(Emphasis added.)

DATED: April 2, 1991.

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California

GEORGE WILLIAMSON, Chief Assistant
Attorney General - Criminal Division

HARLEY D. MAYFIELD, Senior Assistant
Attorney General

FREDERICK R. MILLAR, JR.
Supervising Deputy Attorney General



LOUIS R. HANOIAN
Deputy Attorney General

Counsel for Amicus Curiae
State of California

LRH:lv
SD91XU0003

APPENDIX

List of the Amici Curiae

State of Alabama
James H. Evans, Attorney General
250 Administration Building
64 North Union Street
Montgomery, Alabama 36130

State of Arizona
Grant Woods, Attorney General
1275 West Washington
Phoenix, Arizona 85007

State of Colorado
Gale A. Norton, Attorney General
1525 Sherman Street
Third Floor
Denver, Colorado 80203

State of Connecticut
John J. Kelly, Chief State's Attorney
340 Quinnipiac Street
Wallingford, Connecticut 06492

State of Florida
Robert A. Butterworth, Attorney General
State Capitol
Tallahassee, Florida 32399-1050

State of Indiana
Linley E. Person, Attorney General
219 State House
Indianapolis, Indiana 46204

Commonwealth of Kentucky
Frederic J. Cowan, Attorney General
State Capitol
Frankfort, Kentucky 40601

State of Maryland
J. Joseph Curran, Jr., Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202-2021

State of Mississippi
Mike Moore, Attorney General
Carroll Gartin Justice Building
Post Office Box 220
Jackson, Mississippi 39205-0220

State of Missouri
William L. Webster, Attorney General
Supreme Court Building Box 899
Jefferson City, Missouri 65102

State of Montana
Marc Racicot, Attorney General
215 North Sanders
Helena, Montana 59620-1401

State of Nebraska
Don Stenberg, Attorney General
2115 State Capitol Building
Lincoln, Nebraska 68509-8920

State of Nevada
Frankie Sue Del Papa, Attorney General
Capitol Complex
Carson City, Nevada 89710

State of New Jersey
Robert J. Del Tufo, Attorney General
CN080
Trenton, New Jersey 08625

State of North Carolina
Lacy H. Thornburg, Attorney General
P.O. Box 629
Raleigh, North Carolina 27602-0629

State of Ohio
Lee Fisher, Attorney General
State Office Tower
30 E. Broad Street
Columbus, Ohio 43215

State of Oregon
Dave Frohnmayer, Attorney General
400 Justice Building
Salem, Oregon 97310

State of Pennsylvania
Ernest D. Preate, Jr., Attorney General
Strawberry Square, 14th Floor
Harrisburg, Pennsylvania 17120

State of South Carolina
T. Travis Medlock, Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

State of South Dakota
Mark W. Barnett, Attorney General
State Capitol Building
Pierre, South Dakota 57501

State of Washington
Kenneth O. Eikenberry, Attorney General
Seventh Floor, Highway License Building
Olympia, Washington 98504

CERTIFICATE OF SERVICE BY MAIL

NO. 90-5721

PERVIS TYRONE PAYNE, Petitioner,

v.

STATE OF TENNESSEE, Respondent.

the United States, states:

That his business address is 110 West A Street, Suite 700, San Diego, California, 92101; that on April 4, 1991, he caused to be served a true copy of the attached Brief of the State of California, joined by the states of Alabama, Arizona, Colorado, Connecticut, Florida, Indiana, Kentucky, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota and Washington, as Amici Curiae in the above-entitled matter, on counsel for petitioner and counsel for respondent by placing same in an envelope addressed as follows:

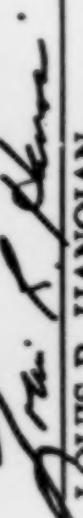
J. Brooke Lathram, Esq.
BURCH, PORTER & JOHNSON
130 North Court Avenue
Memphis, Tennessee 38103

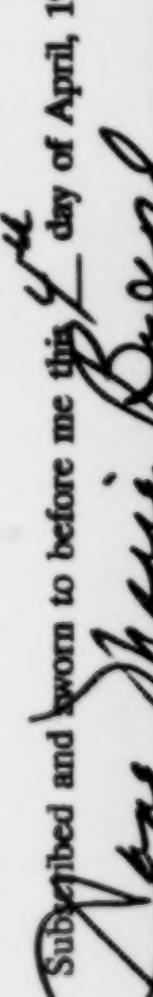
(Attorney for Petitioner)

Kathy M. Prince
Assistant Attorney General
State of Tennessee
Office of the Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37243-0485

(Attorney for Respondent)

Said envelope was then sealed and deposited in the United States mail at San Diego, California, with the postage thereon fully prepaid.


LOUIS R. HANOIAN
Deputy Attorney General


Subscribed and sworn to before me this 4th day of April, 1991.
Anne Marie Buford
Notary Public in and for said County and State


ANNE MARIE BUFORD
County of San Diego
My Commission Expires 11/19/93

APR 6 19

U.S. DEPT. OF JUSTICE

INT.

THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PURVIS TYRONNE PAYNE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

Argued October 1, 1990
Decided October 1, 1990

DISBURSALS OF THE
CRIMINAL JUSTICE FOUNDATION
TO PURVIS TYRONNE PAYNE

Kerry S. SCHROEDER
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

*Attorney for Amicus Curiae
Criminal Justice Legal Foundation*

BEST AVAILABLE COPY

QUESTION PRESENTED

Should *Booth v. Maryland*, 482 U. S. 496 (1987) and *South Carolina v. Gathers*, 490 U. S. 805 (1989) be overruled?

TABLE OF CONTENTS

Interest of amicus curiae	1
Summary of facts and case	2
Summary of argument	3
Argument	3
I	
Evenhandedness should be the sole basis of constitutional restrictions on capital sentencing procedure	3
A. Stare decisis and its limitations	3
B. <i>Furman v. Georgia</i>	7
C. The <i>Woodson</i> departure	9
II	
<i>Booth</i> should be overruled in part	13
A. Emotional impact on the family	13
B. Opinions and statements of family members	17
III	
<i>Gathers</i> should be overruled completely	17
IV	
The testimony and argument in the present case were proper	19
Conclusion	20

TABLE OF AUTHORITIES

Cases

Booth v. Maryland, 482 U. S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987)	3, 7, 13, 15, 16, 17
Boyde v. California, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990)	15
Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963)	6
Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972)	3, 8, 9, 16
Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976)	8, 9
Helvering v. Hallock, 309 U. S. 106, 84 L. Ed. 604, 60 S. Ct. 444 (1940)	6, 7
Helvering v. St. Louis Union Trust Co., 296 U. S. 39, 80 L. Ed. 29, 56 S. Ct. 74 (1935)	6
Jurek v. Texas, 428 U. S. 262, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976)	9
Klein v. United States, 283 U. S. 231, 75 L. Ed. 996, 51 S. Ct. 398 (1931)	6
Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978)	16
Marks v. United States, 430 U. S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977)	4, 8
McCleskey v. Kemp, 481 U. S. 279, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987)	18

McGautha v. California, 402 U. S. 183, 28 L. Ed. 2d 711, 91 S. Ct. 1454 (1971)	7, 8
Mistretta v. United States, 488 U. S. 361, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989)	10, 11
People v. Sirhan, 7 Cal. 3d 710, 487 P.2d 1121 (1972)	19
Profitt v. Florida, 428 U. S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976)	9
Skipper v. South Carolina, 476 U. S. 1, 90 L. Ed. 2d 1, 106 S. Ct. 1669 (1986)	15
South Carolina v. Gathers, 490 U. S. 805, 104 L. Ed. 2d 876 109 S. Ct. 2207 (1989)	3, 7, 18
State v. Payne, 791 S. W. 2d 10 (Tenn. 1990)	2, 19
Sumner v. Shuman, 483 U. S. 66, 97 L. Ed. 2d 56, 107 S. Ct. 2716 (1987)	11
United States v. Title Insurance & Trust Co., 265 U. S. 472, 68 L. Ed. 1110, 44 S. Ct. 621 (1924)	4
United States v. Ray, 920 F. 2d 562 (CA9 1990)	11
Vasquez v. Hillery, 474 U. S. 254, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986)	5
Wainwright v. Sykes, 433 U. S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977)	6
Walton v. Arizona, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990)	12, 14
Woodson v. North Carolina, 428 U. S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976)	9, 10, 16
United States Constitution	
U. S. Const. amend. XIV, § 1	12

State Statutes	
Cal. Pen. Code § 211-213	14
§ 243(a)	14
§ 263	14
§ 264(a)	14
§ 460	14
§ 486	14
§ 490	14
Rules of Court	
Federal Rules of Evidence 403	15
Treatises	
Blackstone, <i>Commentaries</i> 389 (1769)	10
Chamberlain, <i>The Doctrine of Stare Decisis: Its Reasons and Its Extent</i> (1885)	4
J. Nowak, R. Rotunda, J. Young, <i>Constitutional Law</i> (3rd ed. 1986)	8
Miscellaneous	
Black's Law Dictionary (5th ed. 1979)	3
Cassou & Taigher, <i>Determinate Sentencing in California: The New Number Game</i> , 9 Pac. L.J. 1 (1978)	10
Douglas, <i>Stare Decisis</i> , 49 Colum. L. Rev. 735 (1949)	5, 8
Maguire, <i>The Impact of Burglary Upon Victims</i> , 20 Brit J. of Criminology 261 (1980)	14
Model Penal Code (1990)	14
Scheidegger, <i>Capital Punishment in 1987: The Puzzle Nears Completion</i> , 15 West. St. L. Rev. 95 (1987)	9, 12, 18
J. Wilson, <i>Thinking About Crime</i> (1975)	10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

PURVIS TYRONE PAYNE,
Petitioner,
vs.
STATE OF TENNESSEE,
Respondent.

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a rule which has prohibited sentencing juries from considering the full measure of the harm that murderers cause to the victims of their crimes. That rule

1. Both parties have consented in writing to the filing of this brief.

is contrary to the rights of victims which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Charisse Christopher lived in an apartment with her two children, three and one-half year old Nicholas and two and one-half year old Lacie. Neighbors heard bloodcurdling screams and called the police. *State v. Payne*, 791 S. W. 2d 10, 11 (Tenn. 1990). A policeman saw defendant leaving the apartment, covered with blood. *Id.*, at 12.

Police arriving at the apartment found blood all over the walls and floor. Nicholas was alive, but had stab wounds completely through his body damaging most of the abdominal organs. *Ibid.*

Charisse and Lacie were dead. Charisse had 42 stab wounds and Lacie had nine. *Ibid.*

Defendant was convicted of the murder. *Id.*, at 11. During the penalty phase, Nicholas's grandmother gave this testimony:

"Q. Ms. Zvolanek, how has the murder of Nicholas's mother and his sister affected him?

"A. He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He come to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell yes. He says, I'm worried bout my Lacie." *Id.*, at 17-18.

During closing argument, the prosecutor commented on the impact of the deaths on Nicholas. *Id.*, at 18. In response to defense argument that defendant had lived an "exemplary life," he said that Charisse and Lacie had also "lived exemplary lives. But they are not here with us anymore." *Id.*, at 19.

The state supreme court rejected defendant's claims under *Booth v. Maryland*, 482 U. S. 496 (1987) and *South Carolina v. Gathers*, 490 U. S. 805 (1989). 791 S. W. 2d, at 18-19. This Court granted certiorari and requested briefing on whether *Booth* and *Gathers* should be overruled. 48 BNA CrL 3147. The Court later amended the grant of certiorari to limit it to the *Booth/Gathers* issue. 48 BNA CrL 3152.

SUMMARY OF ARGUMENT

On matters of criminal procedure, the doctrine of stare decisis rests primarily on the need to insure that the law develops in a principled and intelligible fashion. Where a body of law has developed erratically and where anomalies have arisen, overruling anomalous precedents furthers the goal that the doctrine of stare decisis is intended to protect.

Booth v. Maryland, 482 U. S. 496 (1987) and *South Carolina v. Gathers*, 490 U. S. 805 (1989) are the product of erratic development of the law of federal restrictions on state capital punishment. They are contrary to the fundamental principles of evenhandedness which underlies *Furman v. Georgia*, 408 U. S. 238 (1972). They should therefore be overruled.

ARGUMENT

I. Evenhandedness should be the sole basis of constitutional restrictions on capital sentencing procedure.

A. Stare Decisis and Its Limitations.

Any suggestion that a precedent be overruled must address the doctrine of stare decisis. The full expression is *stare decisis et non quieta movere*, which means to adhere to precedents and not to unsettle things which are established. *Black's Law Dictionary* 1261 (5th ed. 1979). The limitations of the doctrine are shaped by the purposes of the doctrine.

Reliance is one major purpose. People need to rely on a consistent interpretation of the law in order to shape their own conduct.

"Law, to be obeyed, must be known; to be known, it must be fixed; to be fixed, what is decided to-day must be followed to-morrow; and *stare decisis et non quieta movere* is simply a sententious expression of these truths." Chamberlain, *The Doctrine of Stare Decisis: Its Reasons and Its Extent* 26 (1885).

The reliance interest is most common in the substantive law of property and contracts, where people must order their transactions on a settled body of law. It is often said that *stare decisis* has the greatest strength in this area. See, e.g., *United States v. Title Insurance & Trust Co.*, 265 U. S. 472, 486-487 (1924). In the substantive criminal law there is also reliance, however. A person who does an act previously deemed legal should not be punished if the interpretation of the law is changed after the act. However, this protection is provided through limitations on retroactivity even without relying on *stare decisis*. See, e.g., *Marks v. United States*, 430 U. S. 188, 196-197 (1977).

In criminal procedure, the reliance interest lies almost entirely on the side of the prosecution, because only the prosecution needs to defend its judgments on appeal and on habeas corpus. A defendant who successfully relies on an existing procedure at trial is acquitted, and the Double Jeopardy Clause protects him from reversal on appeal. Only in exceedingly rare situations would reliance be a factor in resisting a change in an existing procedural rule which presently favors the defense.²

The importance of procedural precedent favoring criminal defendants therefore rests on considerations other than reliance. One summary can be found in *Vasquez v. Hillery*, 474 U. S. 254, 265-266 (1986) (citation omitted):

"[T]he important doctrine of *stare decisis* [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' "

Notwithstanding the last clause, however, "experience and facts newly ascertained" are not the only reasons for overruling precedent. Some bodies of law have *not* "develop[ed] in a principled and intelligible fashion." Sometimes it is painfully obvious to society that principles announced as "bedrock" are *in fact* founded in the proclivities of individuals and not in the law.

Where this is true, the fundamental reason for adherence to precedent set forth so eloquently in *Hillery* does not exist. When a body of law has followed a zigzag course through a long series of narrowly-divided votes (or, even worse, fractured decisions with no majority) problems are certain to arise. Opinions strain to distinguish cases which are not really distinguishable, and anomalies are created. Overruling the anomalies promotes, rather than hinders, the principled and intelligible development of the law. Leaving the anomalies in place leaves lower court judges and lawyers shaking their heads in bewilderment. See Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 749 (1949).

2. Restriction on the use of immunized testimony is one example that comes to mind.

Reluctance to squarely overrule a precedent can defeat the very stability interests that *stare decisis* is supposed to protect. For example, 13 years after *Wainwright v. Sykes*, 433 U. S. 72 (1977) this Court granted certiorari to consider, among other questions, whether *Sykes* really overruled *Fay v. Noia*, 372 U. S. 391 (1963). See Petition for Certiorari in *Coleman v. Thompson*, No. 89-7662, question 4. That question should have been answered long ago.

The classic example of overruling a case to remove an anomaly is *Helvering v. Hallock*, 309 U. S. 106 (1940). The case dealt with estate tax on property transferred to a trust by the decedent during his lifetime. *Id.*, at 109. *Klein v. United States*, 283 U. S. 231 (1931) had held that property was included in the estate for tax purposes when the grantor had conveyed a life estate to his wife during his lifetime with the remainder to follow if the grantor died first. *Klein* rejected reliance on the fine points of the law of future interests and looked instead to the practical effect of the transmission of property from the dead to the living, which is the taxable event under the estate tax law. *Id.*, at 234.

In *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39 (1935), the grantor conveyed his legal title to a trust for the benefit of his daughter with the provision that if the daughter died first the trustee was to convey the property back to the grantor. The majority distinguished *Klein* and held that the property was not part of the estate. "Unlike the *Klein* Case, where the death was the generating source of the title, here . . . the trust instrument and not the death was the generating source." *Id.*, at 45-46.

The *Hallock* Court rejected the call to harmonize these decisions. While *Klein* and *St. Louis Union Trust* were factually distinguishable, the underlying rationale of the *Klein* decision was in conflict with the later case. *Hallock, supra*, 309 U. S., at 118-119. With that possibility rejected, the remaining question was not whether to follow precedent but which precedent to follow. *Hallock* also rejected the notion that the later case was necessarily the one to follow.

"We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Id.*, at 119.

Do the rules of *Booth v. Maryland*, 482 U. S. 496 (1987) and *South Carolina v. Gathers*, 490 U. S. 805 (1989) collide with a doctrine more embracing in scope and intrinsically sounder? Would overruling them help straighten the path of the law and contribute to its principled and intelligible development? Would overruling promote rather than inhibit public confidence that constitutional doctrine is based upon law rather than the proclivities of individuals? These are questions which should inform and guide the decision to overrule or not overrule. To answer them, we first return to square one.

B. Furman v. Georgia.

Does the Eighth Amendment regulate the procedure by which the punishment is determined? That is, can a given sentence for a given defendant for a given crime be "cruel and unusual" or not depending on the procedure by which that punishment is imposed? On its face, the idea of "procedurally cruel and unusual punishment" seems absurd. Yet the existence of such a concept is uniformly considered to be the law of the land. This tortured misconstruction of the Eighth Amendment is a case study in the misuse of precedent.

The trail begins with *McGautha v. California*, 402 U. S. 183 (1971). McGautha challenged the procedures by which capital punishment was imposed under the Due Process Clause. Justice Harlan, writing for the majority, rejected the argument in a long and careful opinion. Justice Black concurred with a brief but profound statement. "Although some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never

believed that lifetime judges in our system have any such legislative power." *Id.*, at 226.

The next assault was made on the grounds of the Eighth Amendment. How can the purely substantive prohibition against cruel and unusual punishment be relevant to a procedural objection? Two answers are suggested in the various opinions in *Furman v. Georgia*, 408 U. S. 238 (1972): (1) it is not relevant, see *id.*, at 397 (Burger, C. J., dissenting); or (2) it is relevant if a state's procedure contains such systemic defects as to render *all* of the state's death sentences unconstitutional, see *id.*, at 256-257 (Douglas, J., concurring); *id.*, at 310 (Stewart, J., concurring); *id.*, at 313 (White, J., concurring). The three opinions which accepted the second answer have been deemed the opinion of the Court. *Gregg v. Georgia*, 428 U. S. 153, 169, n. 15 (1976).³

Justice Douglas's opinion relies on the Eighth Amendment in name only. Beneath the transparent membrane is a pure equal protection argument, and Justice Douglas relies explicitly on the Equal Protection Clause in his conclusion. 408 U. S., at 257. Yet Justice Douglas felt "imprisoned in the *McGautha* holding." *Id.*, at 248. This is a strange and uncharacteristic statement. Cf. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949). Perhaps it was out of respect for a recently deceased colleague.

Justice White's opinion was clearly addressed to the statewide effect of the purely discretionary imposition of the punishment in a large class of cases theoretically eligible for the punishment. "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U. S., at 313. Is this not also an equal protection argument? Different treatment of similarly situated people without a "meaningful" (or "rational") basis is the very heart of equal protection analysis. See J. Nowak, R.

Rotunda, J. Young, *Constitutional Law* § 14.2, at 525 (3rd ed. 1986).

Justice Stewart's reasoning is essentially the same. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . [T]he petitioners are among a capriciously selected handful upon whom the sentence of death has in fact been imposed." 408 U. S., at 309-310. Inequality, not cruelty, is the heart of the problem.

C. The Woodson Departure.

The next set of cases also dealt with systemic challenges to the entire capital sentencing scheme of states. Georgia's system of "guided discretion" was approved. *Gregg v. Georgia*, 428 U. S. 153 (1976). So was Florida's substantially similar system. *Proffitt v. Florida*, 428 U. S. 242 (1976). The Texas system of basing the sentence primarily on future dangerousness was approved, but the plurality conditioned its approval on a strained construction of the statute. *Jurek v. Texas*, 428 U. S. 262, 272 (1976).

North Carolina's statute imposing a mandatory death sentence for a sweeping variety of murders was struck down in *Woodson v. North Carolina*, 428 U. S. 280 (1976). The plurality gave three reasons. One of the three was fully consistent with the underlying equal protection rationale of *Furman*; another set off on a collision course with it.

The plurality's first reason was a finding that the North Carolina law "departs markedly from contemporary standards." *Id.*, at 301. This reason is entirely unrelated to *Furman* and need not be considered further here. The second reason was a disbelief that this sweeping statute would ever be enforced as written. Widespread jury nullification and prosecutorial decisions not to charge were inevitable. *Woodson v. North Carolina*, 428 U. S. 280, 302-303 (1976). The point is well taken. These inevitable nullifications would have occurred on an arbitrary and possibly racist basis, just as the old standardless jury discretion system had granted arbitrary leniency. See Scheidegger, *Capital Punishment in 1987: The Puz-*

3. The *Gregg* opinion is itself a plurality, but the point was accepted by a majority in *Marks, supra*, 430 U. S., at 143.

zle Nears Completion, 15 West. St. L. Rev. 95, 109 (1987).

The last ground for the plurality's decision was a bolt from the blue. Despite an acknowledged lack of precedent for any constitutional requirement for individualized sentencing, see 428 U. S., at 296, 304, the plurality created one. The Eighth Amendment now required individualized consideration not only of the crime but also "the character and record of the individual offender." *Id.*, at 304. The sovereign power of the people of the states to decide through the democratic process to prescribe a given punishment for a given crime and to uniformly enforce that punishment thus vanished in a cloud of blue smoke. The power to grant mercy for capital offenses, vested in the chief executive for centuries, see 4 W. Blackstone, *Commentaries* 389 (1769), was now constitutionally required to be shared with a single judge or with 12 private citizens. Justice Black's admonition from *McGautha* was forgotten.

The *Woodson* plurality raised discretionary sentencing to a constitutional mandate on the basis of what it perceived to be a long established and universally accepted consensus, 428 U. S., at 296-297, and "prevailing practice," *id.*, at 304. In fact, belief in discretionary sentencing had peaked before *Woodson* and was already on the decline. Professor James Q. Wilson had published his influential book *Thinking About Crime* the previous year, asserting, among other cogent arguments, that discretionary sentencing had gone much too far. He proposed that criminal penalties "be primarily designed to fit the crime, with some (but not much) range for judicial discretion . . ." J. Wilson, *Thinking About Crime* 180 (1975). California enacted its pioneering Determinate Sentencing Law the same year as *Woodson*, eliminating administrative term-fixing for most crimes and limiting judicial sentencing discretion to a few structured choices. See Cassou & Tausher, *Determinate Sentencing in California: The New Number Game*, 9 Pac. L.J. 1, 24-25 (1978). Also in the same year, Congress recognized a need "to moderate the disparities in the sentencing practices of individual judges." See *Mistretta v. United States*, 488 U. S. 361, 365 (1989). Only eight years later, Congress adopted a sweeping reform to implement a mandatory guideline system.

See *id.*, at 362-368.

The reason for this widespread disenchantment with discretionary sentencing is precisely in accord with the principle of *Furman*. Too much discretion creates arbitrary results. The punishment should fit the crime, not the chancellor's foot.⁴ Yet *Woodson* caught the falling star of discretionary sentencing and placed it at the zenith of the law. This portion of *Woodson* announced a "bedrock principle" which was not founded on the law but rather on the proclivities of individuals.

The collision between *Furman* and the last portion of *Woodson* became most apparent in *Sumner v. Shuman*, 483 U. S. 66 (1987). That case involved a leftover statute from pre-*Woodson* mandatory sentencing. The Nevada statute provided a mandatory death sentence for murder by inmates already sentenced to life in prison without possibility of parole. *Id.*, at 67.

Unlike the very broad statute in *Woodson*, this very narrow statute was eminently capable of being enforced as written. With its specific and objective criteria for application, the chance of arbitrary and capricious imposition was as close to zero as the criminal law can come. Yet the statute was struck down for violating the foundationless rule of *Woodson* requiring discretionary sentencing regardless of whether there would be arbitrary nullification. *Id.*, at 85. Only two kinds of punishment are available for life-without-parole prisoners: (1) death and (2) administrative sanctions such as more restrictive confinement or denial of clemency. The latter are punishments that are typically imposed without trial and for far lesser offenses than premeditated murder. *Shuman* thus holds that a jury must be permitted to let some two-time murderers go

4. "For the benefit of members of the bar who might try and guess how I will exercise this discretion, let the record reflect that I wear a 9 1/2 wide." *United States v. Ray*, 920 F. 2d 562, 569 (CA9 1990) (Kozinski, J., dissenting).

essentially unpunished for the second murder, while others are put to death for the same crime. To punish them all the same would be "cruel and unusual," we are told.⁵

It is time, amicus submits, to take the same step the Court took in *Helvering v. Hallock*. It is time to recognize that two lines of precedent are in irreconcilable conflict. One of them must be jettisoned to maintain the "principled and intelligible" development of the law.

The evenhandedness doctrine of *Furman v. Georgia* is more embracing in scope and intrinsically sounder. Equal protection is expressly mandated by the Constitution. U. S. Const. amend. XIV, § 1. The *Woodson-Shuman* rule that the sentencer must make a discretionary judgment, regardless of whether evenhandedness requires such discretion, was created out of whole cloth. The presence in the law of two contradictory grounds for reversing capital sentences is due in substantial part to "the proclivities of individuals" who, despite precedent, have provided two automatic votes to reverse every sentence regardless of the defendant's theory. To invoke the doctrine of stare decisis to preserve an anomaly created through defiance of precedent is directly contrary to the purpose of that doctrine as set forth in *Hillery*.

To eliminate the conflict, the rule should be that evenhandedness is the *only* source of federal constitutional limitations on capital sentencing procedure. Rules which directly and substantially promote that goal should remain in effect, and those which do not should no longer be considered federal questions. "Thus, the procedural elements of a sentencing scheme come within the prohibition [of the Eighth Amendment], if at all, only when they are of such a nature as systematically to render the infliction of a cruel punishment 'unusual.'" *Walton v. Arizona*, 111 L. Ed. 2d 511, 539, 110 S. Ct. 3047, 3066 (1990) (Scalia, J., concurring).

5. *Shuman* is discussed in somewhat more detail in Scheidegger, *supra* p. 9, 15 West. St. L. Rev., at 118-120.

With this in mind, we turn to the issues at hand.

II. *Booth* should be overruled in part.

In *Booth v. Maryland*, 482 U. S. 496 (1987), the defendant robbed and murdered an elderly couple, Irvin and Rose Bronstein. *Id.*, at 497. A victim impact statement (VIS) was prepared based on interviews with the Bronstein's son, daughter, son-in-law, and granddaughter. *Id.*, at 499. The majority summarized the contents this way:

"The VIS in this case provided the jury with two types of information. First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant." *Id.*, at 502.

Actually, the VIS provided *three* types of information, not two. The emotional impact on the family is different from the personal characteristics of the victims and needs to be analyzed separately. In the remainder of this part, we will discuss emotional impact and family opinions, reserving personal characteristics for the discussion of *Gathers* in part III.

A. Emotional Impact on the Family.

The blameworthiness of a criminal's conduct is not and never has been dependent solely on the extent of physical injury and property damage. Since the early days of the common law, many crimes have been recognized as more serious because of the emotional damage inflicted.

The most obvious example is rape. The physical injury is often no greater than that in a misdemeanor battery; it may

even be less. Yet in California, for example,⁶ simple battery is a misdemeanor punishable by only six months in jail, Cal. Pen. Code § 243(a), while rape is a felony punishable by three, six, or eight years in state prison, *id.*, § 264(a). The difference is “the outrage to the person and feelings of the victim.” *Id.*, § 263.

If a person takes a small amount of money from another by stealth, that is petty theft, a misdemeanor. See, e.g., *id.*, §§ 486, 490. If he takes the same property by force, even without inflicting any physical harm, that is robbery, a felony. *Id.*, §§ 211-213. The robber is punished more severely because of the psychological harm he causes, not only to his immediate victim but also to society at large. See Model Penal Code § 222.1 Comment at 98 (1980).

The property damage caused by burglary of a warehouse is the same as that caused by burglary of a home, yet the latter is generally recognized as a greater offense. See, e.g., Cal. Pen. Code § 460; Model Penal Code § 221.1. One major difference is the psychological harm caused by invasion of the home. See generally Maguire, *The Impact of Burglary Upon Victims*, 20 Brit. J. of Criminology 261 (1980).

The *Booth* majority called the collateral injury to the family members “wholly unrelated to the blameworthiness of a particular defendant.” 482 U. S., at 504. If capital sentencing is to be discretionary, the entire purpose of the penalty phase must be to separate some murders as being more deserving of punishment than others, even though every homicide results in death. Additional harm beyond the death would seem to be a highly relevant factor in making such a separation.

As Justice Scalia has pointed out, the sentencing decision is a unitary one. The decision to grant leniency cannot be separated from the decision to deny it. *Walton v. Arizona*, 111

6. California law is used here as a convenient example. Most states have similar distinctions among crimes.

L. Ed. 2d 511, 537, 110 S. Ct. 3047, 3064 (1990) (concurring opinion). The presence of a factor and the absence of the same factor are equally relevant. The relevance of the evidence sought to be excluded can be judged only in relation to other evidence which is permitted or even required to be admitted.

What evidence is *more* relevant than the degree of additional harm the defendant has caused? In *Boyde v. California*, 108 L. Ed. 2d 316, 330, n. 5, 110 S. Ct. 1190, 1199 (1990), the defendant introduced evidence that he had won a dance choreography award while in prison. The state was constitutionally required to admit this evidence. *Skipper v. South Carolina*, 476 U. S. 1 (1986). Is artistic ability or lack of it more relevant than the harm or lack of harm caused to third persons by the crime? Most people would believe that additional harm is more relevant than artistic ability and more relevant than the bulk of similar character evidence introduced in capital sentencing proceedings.

The *Booth* majority considered the additional harm irrelevant because it is, in most cases, unintended by the killer. 482 U. S., at 504-505. An example illustrates the fallacy of this reasoning. Suppose that a gunman shot his target on a crowded subway, and the bullet passed through the victim, killing him and injuring another person. That additional *physical* injury would certainly be relevant. While the defendant may not have intended it, he recklessly created the danger that it would happen. Why should other kinds of loss be different? Loss to others is the natural and probable consequence of a death. If the killer acts with disregard of that possibility, it is not unfair to charge him with the consequences.⁷

7. Some of the damage in *Booth* was quite attenuated, such as the pall cast over a relative's wedding. 482 U. S., at 500. Such evidence should generally be excluded under state equivalents of Rule 403 of the Federal Rules of Evidence, but it need not be a constitutional question.

The portion of *Booth* excluding this evidence is a twisted offshoot from the illegitimate branch of *Woodson v. North Carolina*, *supra*. As expanded in *Lockett v. Ohio*, 438 U. S. 586 (1978), that doctrine requires the sentencer to consider “*as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Id.*, at 604 (emphasis in original). *Booth* builds another layer on the top of this foundationless tower, citing *Woodson*’s out-of-the-blue “uniquely individual human being” requirement. 482 U. S., at 504. *Booth* holds in effect that a statute permitting consideration of *any other factors* will result in a form of strict scrutiny nearly certain to be fatal. See *id.*, at 502. Further, while any limitation on “circumstances of the offense” that the defendant may put forward risks a reversal for “*Skipper error*,” circumstances offered by the prosecution must, apparently, be limited to those immediately obvious at the scene.

However this debate might be resolved in a state legislature or a state court, the sole federal question should be whether the consideration of the harm to third persons renders the imposition of the death penalty arbitrary and capricious. Returning to the original language of the controlling opinions in *Furman v. Georgia*, 408 U. S. 238 (1972), is there any danger that allowing such evidence will cause the death penalty to be applied “selectively to minorities”? See *id.*, at 245 (Douglas, J.). Would it render those sentenced to death a “capriciously selected random handful”? See *id.*, at 309-310 (Stewart, J.). Would it render the penalty “so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others”? See *id.*, at 312 (White, J.). These are the questions that should be asked if the law is to remain true to *Furman*. The answers are clearly no.

Additional psychological harm to third persons is relatively objective compared to most penalty phase evidence. Its receipt into evidence and consideration by the jury will make sentencing less random, less arbitrary, and more closely related to what the defendant has actually done. That should end the federal inquiry.

B. Opinions and Statements of Family Members.

Booth involved a factor not involved in the present trial, and the Court may not wish to rule on it. If *Booth* is otherwise overruled, however, it may be worth a footnote.

The VIS in *Booth* included statements by the family members of their opinions about the case. 482 U. S., at 500. These statements were read from a text by the prosecutor, but apparently in-person statements were sometimes used. *Id.*, at 499.

Unlike the rule concerning impact on the family, a rule excluding their opinions and arguments does not collide with *Furman*, and the stare decisis argument is stronger here. While the injury to the family is relevant to culpability, the family’s eloquence in expressing their outrage is not. *Id.*, at 505. It is a random factor, a kind best avoided. While the rule probably should not be a constitutional one, there is no compelling reason to overrule it.

III. Gathers should be overruled completely.

The *Booth* majority made an important point about equal protection for victims, citing Justice Douglas’s *Furman* opinion. “We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy.” *Booth v. Maryland*, 482 U. S. 496, 506, n. 8 (1987).

It is a troubling point, and counsel for amicus once defended the *Booth* ruling on this ground.

“Suppose A murders a prominent attorney from a large and wealthy family and B murders a bum on skid row under otherwise identical conditions. Can we morally punish A more harshly than B? If we do, are we not denying the bum equal protection of the laws in

the deepest and most fundamental sense?" Scheidegger, *Capital Punishment in 1987: The Puzzle Nears Completion*, 15 West. St. L. Rev. 95, 117 (1987).

This position is theoretically sound but erroneous in practice. The error was dramatically demonstrated in *South Carolina v. Gathers*, 490 U. S. 805 (1989).

"Reverend Minister" Richard Haynes was a man some people might consider a "bum." He was unable to hold a job. He rotated in and out of mental hospitals. He believed himself to be a minister and walked around carrying several bags of religious articles and talking to people about God. *Id.*, at 807, 809.

Victims depend for their vindication on the zeal of prosecutors. There is always an underlying concern that the zeal may be less intense when the victim is from the lower strata of society or a disfavored racial group. See, e.g., *McCleskey v. Kemp*, 481 U. S. 279, 346-347 (1987) (Blackmun, J., dissenting). The prosecutor in *Gathers* rose to the challenge.

If there is ever a prosecutors' hall of fame, the *Gathers* prosecutor deserves a place there. Faced with the very real possibility that the jury might brush off the late Mr. Haynes as a crazy, no-account bum, he made a stirring argument on the basis of Mr. Haynes's religious tract and voter registration card. He demonstrated to the jury that Mr. Haynes, despite his problems, had a life worth living. *Id.*, at 808-810.

Looking across the landscape of American law, would allowing this kind of argument make the administration of the death penalty more or less evenhanded? The problem is a mirror image of the evenhandedness portion of *Woodson*.⁸ A statute directing that all mitigating circumstances be ignored was evenhanded on its face, but it would never be enforced that way in practice. It is better to give the jury guidance on

factors we know they will consider anyway. The same is true of the personal characteristics of the victim.

Notwithstanding our prior position, amicus submits that *Gathers*-type argument should be allowed. Where the victim is a pillar of the community the jury will either know that fact going in or they will learn it from incidental information picked up in the course of the trial. Where the victim's qualities lie beneath the surface, argument like the one in *Gathers* is needed to provide those victims with equal protection.

The jury in *Gathers* needed to be told what kind of life had been snuffed out. The jury in *People v. Sirhan*, 7 Cal. 3d 710, 497 P. 2d 1121 (1972) already knew.

IV. The argument in the present case was proper.

If *Gathers* is overruled and if the portion of *Booth* regarding psychological impact on the family is overruled, then the result in this case is beyond question. The grandmother's testimony about the impact on Nicholas and the prosecutor's argument were clearly proper. Justice Fones said it best in his opinion for the Tennessee Supreme Court, *State v. Payne*, 791 S. W. 2d 10, 19 (1990):

"It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims."

8. See *supra* p. 9.

CONCLUSION

The judgment of the Tennessee Supreme Court should be affirmed.

Dated: April, 1991

Respectfully submitted,

KENT S. SCHEIDEGGER

*Attorney for Amicus Curiae
Criminal Justice Legal Foundation*

APR 8 1991

IN THE

OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1990

PERVIS TYRONE PAYNE,

Petitioner,

v.

TENNESSEE,

Respondent.

**ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE**

**BRIEF OF AMICI CURIAE
HON. THOMAS J. BLILEY, JR., ET AL.
IN SUPPORT OF RESPONDENT**

Frank G. Carrington*
4530 Ocenfront
Virginia Beach, Virginia 23451

Michael J. Lockerby
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

David E. Anderson
U.S. House of Representatives
Committee on the
District of Columbia
Room 1310, Longworth House
Office Building
Washington, DC 20515

Counsel for *Amici Curiae*

*Counsel of Record

April 8, 1991

AMICI CURIAE

Hon. Richard K. Armey	Rep. Clyde C. Holloway
Hon. Michael Bilirakis	Rep. Duncan Hunter
Rep. Thomas J. Bliley, Jr.	Rep. Henry Hyde
Sen. Conrad Burns	Rep. Bob Livingston
Sen. Alphonse M. D'Amato	Rep. Bill Lowery
Hon. William E. Dannemeyer	Rep. Bill McCollum
Hon. William L. Dickinson	Rep. Michael G. Oxley
Hon. Robert K. Dornan	Rep. Lewis F. Payne
Hon. John J. Duncan, Jr.	Rep. John Edward Porter
Hon. Barney Frank	Rep. Jim Ramstad
Hon. Elton Gallegly	Rep. Ileana Ros-Lehtinen
Rep. George Gekas	Rep. Dana Rohrabacher
Rep. Newt Gingrich	Rep. Christopher Shays
Sen. Charles E. Grassley	Rep. W. J. Tauzin
Rep. James V. Hansen	Rep. Barbara Vucanovich

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE <u>AMICI CURIAE</u>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
NOTHING IN THE EIGHTH AMENDMENT WARRANTS OVERRIDING THE LEGISLATIVE DETERMINATION THAT VICTIMS HAVE THE RIGHT TO BE HEARD IN THE SENTENCING PROCESS	5
A. Legislative enactments mandating that victim impact statements be considered in sentencing reflect growing public support for the victims' rights movement	6
B. <u>Booth</u> and <u>Gathers</u> have undermined the legislative accomplishments of the victims' rights movement: personalization and enfranchisement of murder victims and their survivors	11
C. The Eighth Amendment is supposed to reflect "contemporary values" rather than be used as a pretext for imposing values different from those expressed through the democratic process	14
D. This Court's decisions in <u>Booth</u> and <u>Gathers</u> represent aberrations in Eighth Amendment jurisprudence	16
E. Overruling <u>Booth</u> and <u>Gathers</u> would promote stability and enhance public respect for this Court and the rule of law	21
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	Page(s)
<u>Booth v. Maryland</u> , 482 U.S. 496 (1987)	passim
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982)	19, 20
<u>Enmund v. Florida</u> , 458 U.S. 782 (1982)	19
<u>Furman v. Georgia</u> , 408 U.S. 238 (1972)	11, 15, 21
<u>Gregg v. Georgia</u> , 428 U.S. 153 (1976)	passim
<u>Mistretta v. United States</u> , 488 U.S. 361 (1984)	7
<u>Powell v. Texas</u> , 392 U.S. 514 (1968)	15
<u>South Carolina v. Gathers</u> , 490 U.S. 805 (1989)	passim
<u>State v. Dixon</u> , 283 So.2d 1 (Fla. 1973)	17
<u>Tennessee v. Payne</u> , 791 S.W.2d 10 (Tenn. 1990)	3, 19
<u>Thornburg v. American College of Obstetricians and Gynecologists</u> , 476 U.S. 747 (1986)	21
<u>Trop v. Dulles</u> , 356 U.S. 86 (1958)	14
<u>Weems v. United States</u> , 217 U.S. 349 (1910)	18
<u>Witherspoon v. Illinois</u> , 391 U.S. 510 (1968)	4, 5, 18
<u>Woodson v. North Carolina</u> , 428 U.S. 280 (1976)	15, 18
<u>Zant, Warden v. Stephens</u> , 462 U.S. 862 (1983)	19

Statutes

<u>28 U.S.C. § 974(p)</u>	7
<u>Anti-Drug Abuse Act of 1988</u>	8
<u>Children's Justice and Assistance Act of 1986</u>	8
<u>Comprehensive Crime Control Act of 1984, P.L. 98-473</u>	7, 8
<u>Crime Control Act of 1990</u>	8
<u>Victim and Witness Protection Act of 1982, P.L. 97-473</u>	6
<u>Victims of Crime Act of 1984</u>	8
<u>U.S.S.G. §§ 3A1.1, 3A1.2, 3A1.3, 5K2.1, 5K2.2, 5K2.3, 5K2.4, 5K2.5</u>	8

Other Authorities

<u>Douglas, Stare Decisis</u> , 49 Colum. L. Rev. 735 (1949)	22
<u>Fancher, R.E., The Intelligence Men</u> (1985)	19
<u>President's Task Force on Victims of Crime, Final Report</u> (December 1982)	8, 9, 10
<u>S. Rep. 532, 97th Cong., 2d Sess. 10 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 2515</u>	6
<u>S. Rep. 225, 98th Cong., 1st Sess. 170 (1983), reprinted in 1984 U.S. Code Cong. & Admin. News 3353</u>	7
<u>U.S. Bureau of Justice Statistics, Violent Crime in the United States - 1991</u>	12

INTEREST OF THE AMICI CURIAE

Amici are Members of the United States House of Representatives and the United States Senate. Amici's interest in this case is prompted by the fact that Congress has enacted various pieces of legislation intended to ensure that the impact of the crime on the victim is considered at sentencing, including in capital cases. Amici respectfully submit that nothing in the Eighth Amendment warrants overriding the legislative determination that crime victims have the right to be heard in capital cases. Therefore, Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989) ought to be overruled.

INTRODUCTION AND SUMMARY OF ARGUMENT

A jury of his peers sentenced Pervis Tyrone Payne to die for the first degree murder of 28 year old Charisse Christopher and her two and a half year old daughter Lacie.^{1/} The issue before this Court is whether the jury's verdict must be overturned because the jury heard testimony regarding the effect of the murders on three and a half year old Nicholas Christopher,

^{1/} Charisse sustained 42 knife wounds. Tests of a specimen from her vagina were consistent with the presence of semen, and police found a used tampon on the floor near her knee. Charisse's murdered daughter Lacie, two and a half years old, was stabbed nine times in the chest, abdomen, back and head.

whom Payne stabbed and left for dead.^{2/} The testimony at issue consists of the following:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He come to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell yes. He says, I'm worried bout my Lacie.

The foregoing testimony no doubt can be distinguished from the victim impact statement which, in Booth, this Court held violative of the Eighth Amendment. No doubt this Court can also distinguish the State's closing argument regarding the foregoing testimony^{3/} from the prosecutorial comment

^{2/} Nicholas Christopher survived multiple lacerations and several stab wounds that went completely through his body from front to back. Saving Nicholas' life required seven hours of surgery and a transfusion of 1700 cc's of blood -- 400 to 500 cc's more than his estimated normal blood volume.

^{3/} The prosecutorial comment that Petitioner contends violated Booth and Gathers included the following:

But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and to his baby sister.

791 S.W.2d at 18. The victim impact commentary which Petitioner contends is "cruel and unusual punishment" in violation of the Eighth Amendment also included the following statement by the prosecutor:

... And there won't be anybody there -- there won't be his mother there or Nicholas' mother there to kiss him at night.

(continued...)

held objectionable in Gathers. Indeed, the Supreme Court of Tennessee was able to distinguish both Booth and Gathers in affirming the jury's verdict sentencing Payne to death:

We are of the opinion that the prosecutor's argument is relevant to this defendant's personal responsibility and moral guilt. When a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight year old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his "blameworthiness."

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

Tennessee v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990).

This Court, however, need not genuflect before Booth and Gathers. To be sure, the doctrine of stare decisis ought not be disregarded lightly. But this is not a case in which continuing to follow Booth and Gathers would, in the words of Petitioner, "promote[] . . . public confidence in the judiciary and in the authority of constitutional decisions."^{4/} To the contrary, overruling Booth

^{2/} (...continued)

His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby.

Id.

^{4/} Petitioner's Brief at 18.

and Gathers would enhance public respect for this Court. Affirming Payne's death sentence would show that this Court will not assert the Constitution as a pretext for overriding the morals and values of the public at large.

The public has spoken through its elected representatives in the United States House of Representatives. The public has spoken through its elected representatives in the United States Senate. The public has spoken through its elected representatives in state legislatures throughout the country. The public's message is loud and clear: the impact on the victim ought to be considered when sentencing a convicted criminal.

This Court can and should, of course, invalidate laws that — while reflecting the popular will — trample on liberties guaranteed by the Constitution. But in a democracy, the proper role of this Court is not that of super-legislature. Nothing in the text of the Eighth Amendment mandated the result in Booth and Gathers. Nothing in prior Eighth Amendment jurisprudence requires judges and juries to pretend that crimes do not have real effects on real people. To the contrary, as this Court has previously recognized, the jury is the "conscience of the community." Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

Nothing in the Eighth Amendment required the jury that sentenced Payne to death to give more credence to a psychologist's testimony that Payne was

"one of the most polite prisoners he had ever interviewed"^{5/} than to what, at the time of the murder, Payne actually did and to whom. It is not "cruel and unusual punishment" for the jury to reject the argument that an IQ higher than approximately 22 million American citizens constitutes a "mental handicap"^{6/} which gave Payne a license to kill Charisse Christopher and her young children.

The Eighth Amendment does not require that the deck be stacked in favor of criminals and against their victims. And the Eighth Amendment ought not be used as a pretext for breaking "the link between contemporary community values and the penal system" (Witherspoon, 391 U.S. at 519 n.15) which the jury's sentence of Payne reflected. Booth and Gathers are bad constitutional jurisprudence. It is time that they be reversed.

ARGUMENT

NOTHING IN THE EIGHTH AMENDMENT WARRANTS OVERRIDING THE LEGISLATIVE DETERMINATION THAT VICTIMS HAVE THE RIGHT TO BE HEARD IN THE SENTENCING PROCESS.

The Eighth Amendment, as applied to the States by the Fourteenth Amendment, merely prohibits "cruel and unusual" punishment. It does not permit this Court — in the guise of interpreting the Constitution — to second-

^{5/} Petitioner's Brief at 41.

^{6/} Id.

guess the decisions of individual judges and juries that "certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg v. Georgia, 428 U.S. 153, 184 (1976). Nor should the Eighth Amendment be used as a means of thwarting the will of the people as reflected in the enactments of their elected representatives. Unfortunately, this Court's decisions in Booth and Gathers have done just that.

A. Legislative enactments mandating that victim impact statements be considered in sentencing reflect growing public support for the victims' rights movement.

The Congress of the United States has mandated that the impact of crimes on victims be considered in sentencing those convicted of federal crimes. In the Victim and Witness Protection Act of 1982, P.L. 97-473, Congress, among other things, amended Rule 32(c) of the Federal Rules of Criminal Procedure to require the inclusion of victim impact statements as part of the presentence report prepared in federal criminal cases. The Act also authorizes courts to order restitution. The Senate Judiciary Committee report accompanying the Act noted that "insensitivity and lack of concern for the victim and witness is a tragic failing in our criminal justice system, one which hurts the whole society." S. Rep. 532, 97th Cong., 2d Sess. 10 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 2515, 2516.

Because "[m]any times, especially in cases involving plea bargaining, the

judge must pass sentence on the defendant without ever having seen or heard from the victim, much less having had access to information about the impact the crime had on that victim," Congress viewed "the victim impact statement as a first step to ensure that the victim's side is heard and considered by adjudicative officials." Id., at 12-13; 2518-2519. Congress intended that the Act be construed broadly to require the preparation of a victim impact statement "in all crimes where there is a human victim," including "'indirect' victims such as family members of homicide victims." Id. (emphasis supplied). In other words, Congress intended that a victim impact statement be considered in the precise type of case now before this Court.

Congress returned to victims' rights again in the Comprehensive Crime Control Act of 1984, P.L. 98-473. Title II, the Sentencing Reform Act of 1984, effected "sweeping reforms" of federal sentencing²⁷ that strengthened the position of victims. The Sentencing Reform Act retained the requirement that victim impact statements be included in presentence reports under the new regime of determinant, guideline sentencing. Moreover, the Act also authorizes the imposition of an order of notice to victims.

The Sentencing Reform Act also required the U.S. Sentencing Commission to consider harm to victims in promulgating sentencing guidelines and policy statements. The report of the Senate Judiciary Committee further

²⁷ Mistretta v. United States, 488 U.S. 361, 366 (1989).

directed the attention of the Commission to consider "the role that unusual vulnerability of the victim that is known to the defendant should play in the sentencing decision." S. Rep. 225, 98th Cong., 1st Sess. 170 (1983) reprinted in U.S. Code Cong. & Admin. News 3353 (1984). The Sentencing Commission subsequently issued sentencing guidelines and policy statements, which, under 28 U.S.C. § 994(p), are subject to a six month Congressional review period and legislative veto. These sentencing guidelines and policy statements, which Congress allowed to take effect, require courts to consider the harm that the crime causes victims in various ways.^{8/} These include a mandatory penalty enhancement for offenses involving a "vulnerable victim."^{9/} As a result, victim impact information has taken on a heightened importance under the new sentencing regime.

Also contained in the 1984 comprehensive legislation was the Victims of Crime Act of 1984. That Act, later amended by the Children's Justice and Assistance Act of 1986, established the Crime Victims Fund and provided for victim compensation and assistance. Two years later, in the Anti-Drug Abuse Act of 1988, Congress established the Office for Victims of Crime in the

Department of Justice. And in the Crime Control Act of 1990, Congress again addressed issues directly concerning the victims of crime in Titles V and II of the Act (the Victims' Rights and Restitution Act of 1990 and the Victims of Child Abuse Act of 1990, respectively).

The foregoing legislative enactments evince the continuing concern of the Congress for the victims of crime. Many of those enactments reflect the recommendations of the Presidential Task Force on Victims of Crime, appointed by President Ronald Reagan in 1981. After holding public hearings in six cities, the Task Force issued a Final Report in 1982. Among its recommendations: "Legislation should be proposed and enacted that would . . . [r]equire victim impact statements at sentencing. . . ." and "Judges should allow for, and give appropriate weight to, input at sentencing from victims of violent crimes."^{10/} In support of the Task Force's recommendations, the Final Report noted:

Victims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized . . .^{11/}

^{8/} See, U.S.S.G. §§ 3A1.2 (Official Victim), 3A1.3 (Restraint of Victim), 5K2.1 (Death), 5K2.2 (Physical Injury), 5K2.3 (Extreme Psychological Injury), 5K2.4 (Abduction or Unlawful Restraint), 5K2.5 (Property Damage or Loss).

^{9/} U.S.S.G. § 3A1.1 (Vulnerable Victim).

^{10/} President's Task Force on Victims of Crime, Final Report at 33, 76 (December 1982).

^{11/} Id. at 76-77.

The foregoing activities at the federal level have been paralleled by initiatives of state and local governments and private agencies. By 1991, all 50 States had enacted comprehensive victims' rights legislation.¹² Besides amending state constitutions, these enactments established "Victims' Bills of Rights," funded victim-witness assistance program, entitled crime victims to receive compensation or restitution, protected victims and witnesses from intimidation, allowed victims to participate directly in the criminal justice system through such means as victim impact statements,¹³ and otherwise sought to redress the treatment of crime victims "as appendages of a system appallingly out of balance."¹⁴

At the same time, agencies both public and private have been established to provide services to crime victims. Besides helping crime victims enforce their new-found legal rights, such victim service agencies help victims cope with the problems that violent crimes have caused them.¹⁵ According to the U.S. Justice Department's Office for Victims, there were over 10,000 such victim assistance programs as of March 1991. The establishment of such

victim assistance programs along with the federal and state legislative enactments previously described reflect "an outpouring of popular concern for what has come to be known as victims' rights. . ." Booth, 482 U.S. at 520 (Scalia, J., dissenting).

B. **Booth and Gathers have undermined the legislative accomplishments of the victims' rights movement: personalization and enfranchisement of murder victims and their survivors.**

The principal injustice that the victims' rights movement has sought to rectify has been the failure of the criminal justice system to show concern for crime victims as individuals. This failure to "personalize" crime victims was the subject of Justice Blackmun's dissent in Furman v. Georgia, as follows:

[A]lthough the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of the opinions makes reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously devoid of reference to the victims. . . . Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked.

408 U.S. 238, 413-14 (1972) (Blackmun, J., dissenting) (emphasis supplied).

More recently, in his dissent to Booth, Mr. Justice Scalia properly described one of the objectives underlying the victims' rights movement as being to redress:

the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's

¹² MADDVOCATE, Spring 1988, "Victim Legislation Update."

¹³ Id.

¹⁴ Task Force, Final Report at vi.

¹⁵ Examples include counseling centers for victims of violent crime and their survivors, rape crisis centers, child abuse prevention and treatment centers, domestic violence shelters, and mediators.

moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced — which (and not moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty.

Booth, 482 U.S. at 520 (Scalia, J., dissenting) (emphasis supplied)

Like the civil rights movement that preceded it, the victims' rights movement has also had as a principal objective the enfranchisement of a class of citizens to whom justice was previously denied. And the parallels with the civil rights movement do not end there. Victims of crime tend to be disproportionately black, disproportionately poor, and disproportionately young. For example, the murder victimization rate for blacks is six times that of whites, and blacks also experience higher rates of rape, robbery, and aggravated assault.¹⁶ So, too, victimization rates for teenagers and young adults, for households with less than \$7,500 annual income, and for persons living in inner cities are among the highest for any demographic groups.¹⁷

The victim impact statement legislation invalidated by Booth and Gathers represented a good faith attempt to balance protection of defendants' rights

with personalization and enfranchisement of crime victims. Yet with the stroke of a pen, a plurality of Justices of this Court — first in Booth and then in Gathers — has upset the legislative balance. In lieu of the legislative judgment that victims deserve to be heard, this Court has depersonalized and disenfranchised murder victims and their survivors.

While proceeding to depersonalize murder victims in Booth, this Court characterized defendants as "uniquely individual human being[s]" (482 U.S. at 504) — thereby implicitly suggesting that their victims are something less. In startling contrast, the plurality held that information about murder victims as uniquely individual human beings was "irrelevant." Id. at 504-05. Going further, the plurality held that mere references to victims, as persons, must be condemned because they might "divert . . . attention" from the victims' killers. See id. at 505.

Besides depersonalizing murder victims, the Booth and Gathers plurality disenfranchised their survivors. Through the legislative process, survivors had secured the right to participate in the criminal justice system. Through the legislative process, survivors of murder victims had secured the right to tell the sentencing judge and jury the effect of losing their loved ones. By judicial fiat, this Court has told survivors they have no right to be heard. By judicial fiat, this Court has disenfranchised the survivors of murder victims.

This Court's condemnation of the legislative majority's preference for victim impact statements finds no support in the Eighth Amendment or any

¹⁶ U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Violent Crime in the United States, 7 (March 1991).

¹⁷ Id. at 8.

other provision of the Constitution. In a democracy, those whose values command a legislative majority are entitled to have their values reflected in the law so long as majority rule does not impinge upon individual rights guaranteed by the Constitution.

C. The Eighth Amendment is supposed to reflect "contemporary values" rather than be used as a pretext for imposing values different from those expressed through the democratic process.

The text of the Eighth Amendment itself provides no basis for concluding that consideration of the impact of the crime on the victim converts an otherwise valid sentence into unconstitutional "cruel and unusual" punishment. This Court has already decided that the death penalty itself "does not invariably violate" the Eighth Amendment. Gregg, 428 U.S. at 169. The rationale for this Court's decision in Gregg demonstrates the fallacy of the argument that consideration of victim impact statements in the sentencing process is somehow "cruel and unusual." In Gregg, this Court quoted Mr. Chief Justice Warren's observation that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 428 U.S. at 173, quoting Trop v. Dulles, 356 U.S. 86, 101 (1958). This Court's determination of whether considering the impact of the crime on the victim as part of the sentencing process reflects the "contemporary values . . . relevant to the application of the Eighth Amendment . . . does not call for a subjective judgment." Id. Rather, the

Court must "look to objective indicia that reflect the public attitude toward" victim impact statements. Id.

The best "objective indicia" of the "public attitude" toward victim impact statements are the numerous pieces of legislation that mandate their use in sentencing. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 294-95 (1976) ("legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency."). In interpreting the Eighth Amendment, the Members of this Court "may not act as judges as [they] might as legislators." Gregg, 428 U.S. at 175. "[I]n assessing [the victim impact statement] against the constitutional measure, [the Members of this Court] presume its validity." Id. (emphasis supplied). "[A] heavy burden rests on those who would attack the judgment of the representatives of the people." Id. The victim impact statement legislation enacted by Congress and other legislative bodies reflects the fact that "'in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'" Id., quoting Furman v. Georgia, 408 U.S. 238, 383 (Burger, C.J., dissenting).

This Court's decisions in Booth and Gathers have had the pernicious effect of making this Court, "'under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.'" Gregg, 428 U.S. at 176, quoting Powell v. Texas, 392 U.S. 514, 533 (1968). As a result of this Court's

decisions in Booth and Gathers, "[t]he ability of the people to express their preference [for victim impact statements] through the normal democratic processes, as well as through ballot referenda, is shut off." Id. This Court's denial of victims' rights — and of the right to vote for legislation to protect victims' rights — finds no support in the Eighth Amendment's prohibition of cruel and unusual punishment.

D. This Court's decisions in Booth and Gathers represent aberrations in Eighth Amendment jurisprudence.

The notion that the Eighth Amendment prohibits victim impact evidence does not "follow logically from the Court's earlier decisions," as stated in Petitioner's Brief at 21 et seq. To the contrary, Booth and Gathers are aberrations that find no support in prior Eighth Amendment decisions, much less the text of the Constitution itself. The case now before this court illustrates that the practical effect of Booth and Gathers is to "indirectly outlaw [] capital punishment by placing totally unrealistic conditions on its use." Gregg, 428 U.S. at 199 n.50. This Court has declared that information about the victim is "irrelevant" and constitutionally barred from consideration in capital cases. Booth, 482 U.S. at 504-05. As a result of this Court's decisions in Booth and Gathers, there is only one practical way of ensuring that death sentences are not overturned on Eighth Amendment grounds. That is to turn the victim into a "faceless stranger at the penalty phase of a capital trial." Gathers, 490 U.S. at 821 (O'Connor, J., dissenting). Such an absurd

and unjust result does not "follow logically" from either the Eighth Amendment or prior cases construing it.

When this Court rejected the argument that the death penalty itself is "cruel and unusual," it noted that sentencing guidelines such as those contained in the Model Penal Code reduce the risk that a judge or jury "will impose a sentence that fairly can be called capricious or arbitrary." Gregg, 428 U.S. at 194-95. The MPC guidelines which this Court cited with approval in Gregg provide that among the "aggravating circumstances" are that "[t]he murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." See id. at 193-94 n.44. The sentencing judge or jury needs to know the effect upon the victim to determine whether "[t]he murder was especially heinous, atrocious or cruel, manifesting exceptional depravity"? As this Court noted in Gregg, the foregoing standard has been interpreted by the Supreme Court of Florida to mean a "'conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" Id. at 201 n.52, quoting State v. Dixon, 283 So.2d 1, 9 (1973). (emphasis supplied). In this case, the jury was entitled to know what effect Payne had on three and a half year old Nicholas Christopher. The jury was entitled to know what effect it had on Christopher to watch Payne rape his mother before stabbing her to death, and to watch Payne stab his two and a half year old sister to death before Payne stabbed him and left him for dead. If such information is suppressed, the jury cannot make an informed decision whether Payne committed a "conscienceless

or pitiless crime." Nor can the jury make an informed decision whether Payne was "unnecessarily torturous to the victim."

In Gregg, this Court recognized that a legitimate function of "capital punishment is an expression of society's moral outrage at particularly offensive conduct." 428 U.S. at 183. The jury that sentenced Payne is entitled under the Eighth Amendment to express its "moral outrage" about the effect of his crime perpetrated against a young mother and her defenseless children. But according to Petitioner's Brief (see p. 32):

The essential lesson of Booth and Gathers is that the brutal, cold blooded murder of a lonely prostitute is every bit as heinous as the similar killing of a hard working, loving mother.

Nothing in the Eighth Amendment requires sentencing judges and juries to ignore the fact that Payne left three and a half year old Nicholas Christopher an orphan after intending to kill him. The identity of Payne's victims, and the effect of his crimes on them, are "circumstances of the offense"¹⁸ which the jury is entitled to consider in deciding whether to impose the death penalty. To decide whether the death penalty is "proportional" to the crime,¹⁹ the jury needs to know what impact the crime has had. Only then can the jury express the "conscience of the community" (Witherspoon, 391 U.S. at 519)

as to whether the circumstances of the crime make it "so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg, 428 U.S. at 184.

The effect of Booth and Gathers is to focus the sentencing hearing exclusively on "the defendant's background and record." Booth, 482 U.S. at 505. This Court's precedents give defendants considerable latitude to argue that "mitigating circumstances" weigh against imposing the death penalty. See, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982). In this case, the "mitigating evidence" that Payne was allowed to offer at sentencing had nothing to do with either the "circumstances of the crime"²⁰ or Payne's "personal responsibility and moral guilt."²¹ The jury heard from Payne's parents, whose testimony that he was "a good son" (791 S.W.2d at 17) was hardly surprising. The jury also heard from a member of Payne's church, who testified that "it was inconsistent with Defendant's character to have committed these crimes." Id. And the jury heard from a clinical psychologist "who specializes in criminal court evaluation work" (presumably not on a pro bono basis). Id. According to the psychologist, Payne's IQ made him "mentally handicapped."

¹⁸ Woodson, 428 U.S. at 303-04.

¹⁹ See, e.g., Weems v. United States, 217 U.S. 349 (1910); Coker v. Georgia, 433 U.S. 584 (1977).

²⁰ Zant v. Stephens, 462 U.S. 862, 879 (1983).

²¹ Enmund v. Florida, 458 U.S. 782, 801 (1982).

3.125²² The psychologist also "described Defendant as 'somewhat naive' and one of the most polite individuals he had interviewed in jail." *Id.*

Under Booth and Gathers, according to Petitioner, the prosecution can no longer offer evidence of aggravating circumstances to counter "mitigating evidence" such as that offered by Payne in this case. Instead, the Eighth Amendment limits the prosecution, according to Petitioner, to "the cross-examination of defense witnesses, the introduction of its own proof bearing on relevant factors, and the use of appropriate arguments." Petitioner's Brief at 39-40. In other words, the prosecution in this case should have confined its efforts at the sentencing hearing to cross-examining Payne's parents about the factual basis for their testimony that he was a "good son." Alternatively, the prosecution could have sought testimony from others who disagreed with the psychologist's characterization of Payne as "polite."

Nothing in the Eighth Amendment requires the deck to be stacked against murder victims and their survivors. To the contrary, the effect of Booth and Gathers is to withhold relevant evidence which, under the Eighth Amendment, must be considered. Cf. Eddings v. Oklahoma, 455 U.S. 104

(1982). Booth and Gathers prevent the sentencing judge and jury from considering that "the victim is an individual whose death represents a unique loss to society and in particular to his family." Booth, 482 U.S. at 517 (White, J., dissenting).

E. Overruling Booth and Gathers would promote stability and enhance public respect for this Court and the rule of law.

This Court's arbitrary decision that victim impact evidence is unconstitutional has troubling implications for public respect for this Court in particular and the rule of law generally:

When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law.

Furman v. Georgia, 408 U.S. at 308 (Stewart, J., concurring). By overruling Booth and Gathers, this Court will do more than reopen the courthouse doors that have been barred to crime victims and their families. Overruling Booth and Gathers will also promote "the stability of a society governed by law." *Id.* It is this Court's decisions in Booth and Gathers that represent the "mere exercise of judicial will, with arbitrary and unpredictable results." Thornburg v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 786-87 (1986) (White, J., dissenting). Therefore, the rationale for the doctrine of stare decisis is best served in this case by departing from the doctrine and instead overruling Booth and Gathers.

²² The psychologist testified that Payne had a Verbal IQ of 78 and a Performance IQ of 82. An IQ of 80 would place Payne in the 8.8 percentile. Fancher, R.E., The Intelligence Men, 154 (1985). According to the U.S. Bureau of the Census, the total U.S. population in 1990 was 248,709,873. Therefore approximately 22 million Americans share Payne's "mental handicap" and, by Petitioner's reasoning, ought to be exempt from capital punishment.

CONCLUSION

Mr. Justice Scalia, dissenting in Gathers, characterized Booth as "a plainly unjustified intrusion upon the democratic process." 490 U.S. at 825. This precisely sums up the position of amici.

And as that same dissenting opinion pointed out, "it is the Constitution which [each Justice] swore to support and defend, not the gloss which his predecessors may have put on it." Id., quoting Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949). In this case, the result which is most faithful to the Constitution, and to the rule of law, is for this Court to overrule Booth and Gathers while affirming the Supreme Court of Tennessee.

Respectfully submitted,

Frank G. Carrington
4530 Oceanfront Avenue
Virginia Beach, Virginia 23451
Telephone: 804/422-2692

Michael J. Lockerby
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: 804/788-8200

David E. Anderson
U.S. House of Representatives
Committee on the District of
Columbia
Room 1310, Longworth House
Office Building
Washington, D.C. 20515
Telephone: 202/225-7158

Counsel for Amici Curiae

RECEIVED U.S.
FILED

APR 8 1991

OFFICE OF THE CLERK

13

No. 90 - 5721

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

PERVIS TYRONE PAYNE,
Petitioner,
v.
STATE OF TENNESSEE,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

BRIEF, AMICI CURIAE
IN SUPPORT OF RESPONDENT:

THE NATIONAL ORGANIZATION FOR
VICTIM ASSISTANCE, THE NATIONAL
VICTIM CENTER, THE CRIME
VICTIMS LEGAL CLINIC, AND
CALIFORNIA ATTORNEYS FOR
CRIME VICTIMS.

JUDITH ROWLAND
ATTORNEY AT LAW
CRIME VICTIMS LEGAL CLINIC
1221 22ND ST.
SAN DIEGO, CA 92102
(619) 232-3300

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

- I. HAVE CRIME VICTIMS RELINQUISHED TO THE STATE THEIR RIGHTS AS INDIVIDUAL CITIZENS TO EXACT RETRIBUTION FOR HARM COMMITTED AGAINST THEM, CREATING A FUNDAMENTAL DUTY ON THE PART OF THE STATE TO PROTECT AND VINDICATE THESE RIGHTS?
- II. DOES THE 8TH AMENDMENT ALLOW FOR THE USE OF VICTIM IMPACT STATEMENTS IN THE PENALTY/SENTENCING PHASE OF A CAPITAL CASE?
- III. SHOULD A CRIME VICTIM BE RECOGNIZED AS A PARTY AND HAVE STANDING INDEPENDENT FROM THE PUBLIC PROSECUTOR FOR THE LIMITED PURPOSE AT THE SENTENCING PHASE (INCLUDING THE PENALTY PHASE OF A CAPITAL CASE) TO PRESENT A VICTIM IMPACT STATEMENT?

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Authorities	iv
Identity & Interest of Amici Curiae	2
Summary of Argument	5
Introduction	7
Argument	12
 I. SINCE CRIME VICTIMS HAVE RELINQUISHED TO THE STATE THEIR RIGHT TO EXACT INDIVIDUALIZED RETRIBUTION FOR INJURY CAUSED AT THE HANDS OF A WRONGDOER, THE STATE HAS A FUNDAMENTAL DUTY TO VINDICATE VICTIMS' INTERESTS	 12
 II. THE PURPOSE OF A SENTENCING HEARING IS TO BALANCE THE RIGHTS OF THE CONVICTED AGAINST THE HARM SUFFERED BY THE VICTIM IN ORDER TO ACHIEVE THE SOCIETAL GOAL OF DETERRENCE AND	
 FAIRNESS WITHOUT TRANSCENDING THE CONSTRAINTS OF THE 8TH AMENDMENT	 19
 III. THE RIGHT OF CRIME VICTIMS TO JURY CONSIDERATION OF VICTIM IMPACT STATEMENTS OR COMMENT TO THE JURY BY THE PROSECUTOR CONCERNING VICTIM HARM IN THE PENALTY/ SENTENCING PHASE OF A CAPITAL CASE, WILL BE RESOLVED BY RECOGNITION OF VICTIMS' LEGITIMATE CLAIM TO PARTY STATUS (STANDING) INDEPENDENT FROM THAT OF THE PUBLIC PROSECUTOR FOR THIS PURPOSE	 29
 Conclusion	 36

TABLE OF AUTHORITIES

CASES	Page
<u>Ballard v. Superior Court</u> , 64 Cal 2d 159 (1966).....	34
<u>Booth v. Maryland</u> , 482 U.S. 496 (1987).....	19, 24, 27, 28, 30, 31
<u>Bullen v. Superior Court</u> , 204 Cal App. 3d 22 (1988).....	35
<u>Furman v. Georgia</u> , 408 U.S. 238 (1972).....	21
<u>Gregg v. Georgia</u> , 428 U.S. 153 (1976).....	20, 21, 37
<u>McGautha v. California</u> , 402 U.S. 183 (1971).....	20
<u>Minor v. Happersett</u> , 88 U.S. 162 (1875).....	13
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966).....	10
<u>Morris v. Slappy</u> , 461 U.S. 1 (1983).....	13
<u>Oziel v. Superior Court</u> , 223 Cal. App. 3d 1284 (1990).....	35
<u>People v. Bynon</u> , (146 Cal App. 2d 7 (1956).....	34
<u>Snyder v. Massachusetts</u> , 291 U.S. 97 (1934).....	22
<u>Weems v. United States</u> , 217 U.S. 349 (1910).....	22, 23

PERIODICALS

	Page
<u>Aynes, The Right Not to be a Victim</u> , 11 Pepperdine L. Rev. 63 (1984).....	14, 16, 17, 34
<u>Carrington, Crime and Justice: A Conservative Strategy</u> , Critical Issues, The Heritage Foundation (1982).....	15
<u>Gittler, Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems</u> , 11 Pepperdine L. Rev. 117 (1984).....	14, 17
<u>Hudson, The Crime Victim and the Criminal Justice System: Time for a Change</u> , 11 Pepperdine L. Rev. 23 (1984).....	25
<u>Murphrey, The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court</u> , 51 Univ. Chicago Law Rev. 1303 (1988).....	26
<u>Nicholson, G. Forgotten Victims: An Advocate's Anthology</u> , p. vi, (1977).....	9
<u>Roland, D., Progress in the Victims Movement: No Longer the "Forgotten Victim"</u> , 11 Pepperdine L. Rev. 35, 51 (1989).....	17, 35

MISCELLANEOUS

<u>Model Code of Professional Responsibility EC 5-15 (1980).....</u>	33, 34
<u>Statement: 137 Cong. Rec. S3021-02 (daily ed. March 12, 1991) (statement of Sen. Biden).....</u>	18

NO. 90 - 5721

STATUTES

	Page
California Penal Code, Sec. 1191.1.....	35
Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1242 (1982)....	25, 26

TEXTS

16A Am. Jur. 2d <u>Constitutional Law</u> Sec. 363 (1979).....	36
16A C.J.S. <u>Constitutional Law</u> Sec. 442 (1984).....	19

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PERVIS TYRONE PAYNE,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

BRIEF, AMICI CURIAE, OF
THE NATIONAL ORGANIZATION FOR
VICTIM ASSISTANCE, THE NATIONAL
VICTIM CENTER, THE CRIME VICTIMS
LEGAL CLINIC, AND CALIFORNIA
ATTORNEYS FOR CRIME VICTIMS

1. Identity and interest of Amici Curiae:
THE NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, founded in 1975, is a national nonprofit membership organization dedicated to improving the rights and services for victims of crime through national advocacy, victim counseling, technical assistance, training and membership support. NOVA is located in Washington, D.C.

THE NATIONAL VICTIM CENTER, founded in honor of Sunny von Bulow, is a national, nonprofit organization based in Fort Worth, Texas. The Center's purposes are to promote responsiveness of the criminal justice system to the rights and needs of the victims of violent crime, as well as to increase the American public's awareness concerning the plight of crime victims through educational programs, conferences, and publications.

THE CRIME VICTIMS LEGAL CLINIC is a project of the California Center on Victimology, a nationally recognized comprehensive crime victim service agency founded in 1985 and based in San Diego, California. Among the goals of the Clinic and the Center are to protect the rights of crime victims in the criminal justice system, to provide training to the legal and mental health communities who counsel and treat victims of crime, and to reduce the trauma suffered by crime victims, their families, and the community in which they live.

CALIFORNIA ATTORNEYS FOR CRIME VICTIMS is a statewide network of trial litigators, founded in 1989, to protect the rights of crime victims in the civil and criminal justice systems, to give them a stronger, more coordinated voice in legal proceedings

affecting their lives, to share information, strategies and litigation developments and to train civil litigators to represent crime victims.

2. Desirability of a Brief Amici Curiae: the instant case is one in which the interests of victims of crime are directly involved. Amici represent two national victim advocacy organizations, the only law firm (legal clinic) in the country whose only clients are crime victims and is concerned with constitutional issues in criminal law, and the first statewide attorneys organization dedicated to protecting the rights of crime victims in the civil and criminal justice systems.

3. Reasons For Believing that Existing Briefs May Not Present all Issues, and Avoidance of

Duplication: In this brief, Amici will discuss national policy - related and legal issues relating to the impact of this Court's decision in the instant case and peculiar to the crime victim as the primary client. Counsel for Amici have consulted with Counsel for Respondent in an effort to avoid unnecessary duplication and believe that their policy and legal arguments will present issues that are not otherwise raised.

4. Consent of the Parties: Counsel for the Respondent and Counsel for the Petitioner have consented to this filing. Letters to this effect are lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

I. SINCE CRIME VICTIMS HAVE RELINQUISHED

TO THE STATE THEIR RIGHT TO EXACT INDIVIDUALIZED RETRIBUTION FOR INJURY CAUSED AT THE HANDS OF A WRONGDOER, THE STATE HAS A FUNDAMENTAL DUTY TO VINDICATE VICTIMS' INTERESTS.

RECOGNITION OF VICTIMS' LEGITIMATE CLAIM TO PARTY STATUS (STANDING) INDEPENDENT FROM THAT OF THE PUBLIC PROSECUTOR FOR THIS PURPOSE.

INTRODUCTION

- II. THE PURPOSE OF A SENTENCING HEARING IS TO BALANCE THE RIGHTS OF THE CONVICTED AGAINST THE HARM SUFFERED BY THE VICTIM IN ORDER TO ACHIEVE THE SOCIETAL GOAL OF DETERRENCE AND FAIRNESS, WITHOUT TRANSCENDING THE CONSTRAINTS OF THE 8TH AMENDMENT.
- III. THE RIGHT OF THE CRIME VICTIM TO JURY CONSIDERATION OF VICTIM IMPACT STATEMENTS, OR COMMENT TO THE JURY BY THE PROSECUTOR CONCERNING VICTIM HARM, IN THE PENALTY/SENTENCING PHASE OF A CAPITAL CASE, WILL BE RESOLVED BY

As originally conceived, our criminal law was designed to accomplish a very limited but necessary function. That purpose was, quite simply, to protect citizens who chose to exercise their freedom and liberty within the constraints imposed by law, from citizens who chose not to. The need to secure the safety, liberty and property of law-abiding citizens has always been one of the primary justifications for the very existence of government. This principle was averred in the Declaration of Independence as the

creators' endowment of the inalienable right to life, liberty and the pursuit of happiness." It was carried into the preamble of the United States Constitution by a statement of purpose to "establish justice, insure domestic tranquility, and promote the general welfare." It has long been recognized by the United States Supreme Court that government "owes a duty to the people...to maintain peace and order and to assure the just enforcement of the law." The right of personal security from criminal aggression is an inherent and inalienable right. It seems clear that victims, both actual and potential, are central to the criminal justice system. It may be that protection of the lives,

liberty and property of the citizenry in a free society is but one of the basic purposes of government. However, beyond question, it is the primary purpose which justifies the existence of a criminal justice system. Nicholson, G., *Forgotten Victims: An Advocate's Anthology*, P. vi (1977).

There has surfaced within the last decade, a question about the role prosecutors and courts have assigned to crime victims, whom the former purport to represent for some purposes - but not others - and whom the latter have treated as appendages of the prosecutor.

Recent case law supports a position that the crime victim has a role independent from that of the prosecutor, which may be tempered by

judicial authority, resulting in at least limited standing, including the right to make victim impact statements at sentencing hearings in capital cases.

If, however, crime victims are found to have relinquished their rights to exact their own direct and immediate justice for the greater good of the state, then there is a compelling and fundamental duty of the state to support the victim and to represent these interests with no less vigor than is required of a defense attorney in the effective representation of his client.

This Court has previously expressed concern for victims of violent crime. Justice Byron White, in his dissent in Miranda v. Arizona, 384 U.S. 436 at 542 (1966) stated:

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case. (Emphasis added.)

The Court's role in ensuring that the prosecutor upholds his end of this societal contractual relationship, is to conduct a sentencing proceeding - guilt of the accused having been established - which results in a ruling only after thorough and substantive consideration of victim impact (harm).

ARGUMENT

I. SINCE CRIME VICTIMS HAVE RELINQUISHED TO THE STATE THEIR RIGHT TO EXACT INDIVIDUALIZED RETRIBUTION FOR INJURY CAUSED AT THE HANDS OF A WRONGDOER, THE STATE HAS A FUNDAMENTAL DUTY TO VINDICATE VICTIMS' INTEREST.

Woven into the fabric of a free society is the concept of rights and responsibilities. It should be axiomatic that everyone has a

constitutional "right" not to be a victim of crime. A violation of law is an offense against society as well as an invasion of the personal rights of the victim. Perhaps that is the reason a majority of this Court has held that "in the administration of criminal justice, courts may not ignore the concerns of victims." Morris v. Slappy, 461 U.S. 1, 14 (1983). Over one hundred years ago, Chief Justice Waite, speaking for a unanimous Court, observed that: "Allegiance and protection are...reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance." Minor v. Happersett, 88 U.S. 162 (1875).

In early times and even more recently (the American frontier) victims and their families could practice "clan" or "familial" justice,

resulting in full victim participation and immediate gratification. However, progress soon dictated a less random and more systematic approach to justice. So organized or "planned" justice (i.e. the duel) became popular. Again, victim participation and gratification were quick and sure. See Gittler, 11 Pepperdine L.Rev. 117, 123 (1984); Aynes, 11 Pepperdine L.Rev. 63, 72 (1984).

Perhaps it was felt that the addition of a public prosecutor - which came shortly after the American Revolution - would be the great equalizer, thereby solving at least a couple of the principal complaints of both the old English system of private justice and of the old West's system of surefire justice: where only money or a gun carried clout. See Gittler, Supra at 125.

Thomas Jefferson wrote:

Whereas, it frequently happens that wicked and dissolute men, resign themselves to the dominion of inordinate passions, commit violations on the lives, liberties and property of others, and, the secure employment of these having induced men to enter into society, government would be defective in its purpose were it not to restrain such criminal acts by inflicting due punishments on those who perpetuate them...

See Carrington, Esq. Crime and Justice: A Conservative Strategy, Critical Issues, The Heritage Foundation (1982).

The quid pro quo created when this bargain was struck did not mean that crime victims

relinquished their right to demand personalized justice, but rather they agreed to do it by the rules, in return for the government's pledge to make the rules apply uniformly, thereby ensuring their right to the safe enjoyment of their families, lives, liberty, and property. See Aynes, 11 Pepperdine L.Rev. 63, 75 (1984).

This was a fair exchange: that collectively they could protect one another against the depredation of the "wicked and dissolute" more effectively than could one individual's money or another's gun.

Progressively, however, victims have been edged off stage, or, more accurately, they have been shoved aside. What once was a mutually beneficial relationship, is now only good for one of the team members. See

Gittler, Supra at 131, 133. Now there is "dis-ease" in the land; and rightly so: No longer do citizens trust that the agreement is being upheld by their government. They want, and must have, some evidence of good faith and fair dealing in this so-called societal contract. See Aynes, Supra, at 75. The right to participate at the sentencing phase (the penalty phase of a capital offense) seems fair.

At least forty-seven (47) states and the United States Congress have yielded to the public demand for a more meaningful role by approving laws ensuring that crime victims can make a Victim Impact Statement at the criminal's sentencing. Roland, D., Progress in the Victims Movement: No Longer the "Forgotten Victim", 11 Pepperdine L.Rev. 35, 51 (1989).

The criminal justice system cannot isolate itself from the people it was created to protect. According to Senator Joseph Biden, Chairman of the United States Senate Judiciary Committee, in a report to Congress, on March 12, 1991, the United States of America is the most violent nation on earth. This situation is creating an ever growing class of citizens whose collective voice should not, and will not, be ignored. The sentencing authority must not be blocked from hearing all relevant evidence including victim harm, thusly recognizing and validating a continuing faith in this societal contract between a government and its people.

The purpose to be served is compelling, and the duty to implement is no longer optional. Reference to the victim by the prosecutor

will not suffice. The victim's own impact statement during sentencing is the reasonable means of implementation. A determination of reasonableness requires balancing the effect of the private rights with the public good to be achieved. 16A C.J.S. Sec. 442, Constitutional Law (1984).

ARGUMENT

II. THE PURPOSE OF A SENTENCING HEARING IS TO BALANCE THE RIGHTS OF THE CONVICTED AGAINST THE HARM SUFFERED BY THE VICTIM IN ORDER TO ACHIEVE THE SOCIETAL GOAL OF DETERRENCE AND FAIRNESS WITHOUT TRANSCENDING THE CONSTRAINTS OF THE 8TH AMENDMENT.

While it is necessary to keep close watch over the rights of those accused of crime, the over-broad holding of Booth and its

progeny subjects victims to constrictions unsupported by Constitutional principles. Today juries are already given meticulous written guidelines when called upon to address the sentencing alternatives of life or death. Gregg v. Georgia 428 U.S. 153 (1976).

Prior to 1972, capital punishment laws expressly gave juries complete and unsupervised discretion to impose the death penalty. The jury was not required to follow any legal guidelines in making its decision, and it was not provided with any special information about the defendant's background or character beyond that offered to support the defendant's innocence. This unbridled discretion was upheld by the United States Supreme Court as late as 1971. McGautha v. California 402 U.S. 183 (1971). The Court,

however, significantly changed its position in the landmark case of Furman v. Georgia 408 U.S. 238 (1972). Furman, in effect, invalidated all death penalty statutes then in force, and directed that death penalty statutes be imposed under legislatively defined standards. The Furman Court held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary or capricious manner. Id.

In 1976, the Court qualified and refined the Furman decision in Gregg v. Georgia when it established that all sentencing discretion should not be eliminated, but that it must be directed and limited. Gregg, 428 U.S. 153. As first laid down in Furman, juries are now given carefully crafted instructions within

preset and highly scrutinized parameters. Booth, however, goes even beyond those guidelines by narrowing justice to that proverbial filament through which justice for the victim can no longer survive. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

Earlier, the Court in Weems v. United States, 217 U.S. 349 (1910), held that the Eighth Amendment was not static and concluded that:

[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Id.

And so, using this standard as representative of a maturing society, we review the identical crimes of two men stealing loaves of bread from a shopkeeper. One man steals

the loaf to sell for gambling money; the other steals the loaf to feed his family. This "progressive" doctrine, as first enunciated in Weems, proposes that punishment should be determined by weighing the factors of each case, regardless of whether or not different penalties may result.

However, Weems, and the case law since that time, has steadily factored into punishment only the mitigating circumstances proposed by the defendant. This lopsided, "progressive" theory has completely failed America's crime victims. The "decency" that marks the progress of a maturing society should not be limited to defendant concerns. True progressive social enlightenment must mean something more than mere leniency for society's lawbreakers.

The jury needs to hear, to give life to, the abstract of "society". What better way for the jury to assess the harm done than through the voice of the shopkeeper, who suffered the true loss for each loaf of bread.

The Booth court would have the jury balancing a fictionalized reification of society against the defendant who not only is allowed, but is strongly encouraged to parade into the courtroom, a crying lover, a young child, parents and multitudes of friends. This is not simply tipping the scales but rather, breaking them; which leads to leniency not by extenuating circumstances, but by sheer volume.

The so-called progressive notion of society's "maturation" has left a trail of injustices for victims, whose participation and

cooperation have accounted for the successful outcome of many cases. Often, victims are the sole witnesses to the crime and are therefore indispensable to successful prosecutions and convictions. An estimated one-half of all crimes are not reported. The failure of crime victims to report crimes or actively cooperate with police and prosecutors is an alarming trend. Hudson, Crime Victims and the Criminal Justice System, 11 Pepperdine L.Rev. 23, 27 (1984).

Congress acknowledged the importance victims play as witnesses in the criminal court process when it declared in the Omnibus Victim and Witness Protection Act of 1982 that, "Without the cooperation of victims and witnesses the criminal justice system would cease to function; yet with few exceptions these individuals are either

ignored by the criminal justice system or simply used as tools to identify and punish offenders." Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1242 (1982).

Determining a sentence by resultant harm can promote two important societal goals: victims can give voice to the harm a crime has visited upon their personal lives, which, in turn can bring a measure of solace for the pain suffered. Furthermore, the victim, representing a microcosm of society, gives judge and jury a more fair picture of the potential injury to society, and may thus share society's consensus in what sentence should be imposed. See Murphey, 51 Univ. Chi. L.Rev. 1303 (1988).

As Justice Scalia wrote in the dissent in

Booth,

It seems to me, however -- and, I think, to most of mankind -- that the amount of harm one causes does beat upon the extent of his "personal responsibility." We may take away the license of a driver who goes 60 miles an hour on a residential street; but we will put him in jail for manslaughter if, though his moral guilt is no greater, he is unlucky enough to kill someone during his escapade.

It would follow from the holding in Booth, that contrary to Justice Scalia's well-reasoned analysis, punishment tailored to the moral culpability of the criminal, and not to the harm exacted by the crime, would assign equal punishment to the man who

murders and to the man who attempts murder but fails, since both had the intent to murder.

The proponents of the Booth holding argue that by allowing victims a voice, our new justice will be based on a battle of numbers, as well as victim social status: that the identical crime committed against a "popular" victim and against a "homeless orphan" will lead to society judging not the crime committed but rather the person against whom it is committed. The solution, however, is not to stifle the voices of victims whose need is great to give sorrow words.

Victims speaking of harm done, of the effect the crime has had on their lives, do not claim: that one life is more valued than another, but rather bring into sharp focus

for the judge, the jury, and society, the realities of what the aftermath of violent crime exacts on each of these essential parts of life in a free society.

To muzzle all victims at capital sentencing hearings for fear that some may be more persuasive or express more eloquently the horrors of crime, is the truly arbitrary and capricious decision.

ARGUMENT

III. THE RIGHT OF CRIME VICTIMS TO JURY
CONSIDERATION OF VICTIM IMPACT
STATEMENTS OR COMMENT BY THE
PROSECUTOR CONCERNING VICTIM HARM IN
THE PENALTY/SENTENCING PHASE OF A
CAPITAL CASE, WILL BE RESOLVED BY
RECOGNITION OF VICTIMS' LEGITIMATE

CLAIM TO PARTY STATUS (STANDING)
INDEPENDENT FROM THAT OF THE PUBLIC
PROSECUTOR FOR THIS PURPOSE.

In his dissent in Booth, Justice Scalia wrote,

Many citizens have found one-sided, and hence, unjust the criminal trial in which a parade of experiences that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced -- which (and not moral guilt-alone) is one of the reasons society deems his act worthy of the prescribed penalty. . . . There is nothing in the Constitution that dictates the answer, no more in the field of capital punishment than

elsewhere. To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted. If that penalty is constitutional, as we have repeatedly said it is, it seems to me not remotely unconstitutional to permit both the pros and the cons in the particular case to be heard. Booth at 520 (Scalia, J. dissenting). Emphasis added.

Elsewhere in the record of the case before this Court, amici for both the Congress of the United States and for the United States Department of Justice have presented arguments calling upon the Court to heed their strong and persuasive intent in passing laws at the Federal level which say, in sum: "We meant to put crime victims into the courtroom to be heard at all sentencing hearings in criminal cases."

It would appear that Justice Scalia finds no Constitutional impediment to accepting the position taken by the United States Congress and the Department of Justice: that to remedy the imbalance suffered by the victims, and in order to "lay before the sentencing authority the full reality of human suffering the defendant has produced", victim impact should be measured alongside any mitigation

of defendant blame.

The question then must be asked: if victim impact evidence in capital criminal sentencing hearings (penalty phase) is lawful, then does the victim have at least limited standing to be heard for purposes of determining the victim impact evidence, separate and apart from the prosecutor. While prosecutor and victim issues may seldom be at odds for the purpose herein discussed, without a determination about victim standing, the victim remains a nonentity, subject to being used, accorded access only when it suits the prosecutor.

The Canon of Ethics forbids attorneys to represent more than one client whose interests may produce a conflict in representation. Model Code Of Professional

Responsibility EC 5-15 (1980). The Canon goes on to say that doubts should be resolved against the propriety of the representation.

It is settled law that the public prosecutor represents the state specifically, and the victim only very generally. See Aynes, Supra at 73 (1984).

Over at least the last fifty years, prosecutors have appeared at hearings brought by defendants, requesting orders from a court for such things as psychological evaluations (Ballard v. Superior Court, 64 Cal. 2d 159, 1966) and physical examinations (People v. Bynon, 146 Cal App. 2d 7, 1956); as well as exclusion from courtrooms and appearances at lineups. See Aynes, Supra at 73 (1984).

There is now a growing trend to grant victims

the right to appear, and to be heard, in person or by counsel, at various criminal proceedings, (e.g. California Penal Code, Sec. 1191.1). Roland, D., Progress in the Victim Reform Movement: No Longer the "Forgotten Victim", 17 Pepperdine L. Rev., 35, 38 - 42, 50 - 56 (1989). There is also a recognition that the law does not authorize prosecutors to represent victims at such hearings. People v. Bullen, 204 Cal App 3d 22, 25 (1988), Oziel v. Superior Court, 223 Cal App 3d 1284 (1990).

Amici suggest that recognition by the Court of crime victims' independent and legitimate status as parties for the limited purpose herein proposed, will obviate the need to weigh the propriety of the use of victim impact evidence in the context herein argued.

CONCLUSION

The police power imposes on the state the duty to protect the lives of its residents.

[16A Am Jur.2d Constitutional Law Sec. 363 (1979).] The police power is founded on the duty of the state to protect its people and to provide for their safety. It is the foundation upon which our social system rests

16A C.J.S. Constitutional Law Sec. 433 (1984).

The punishment to be meted out must be determined by balancing the harm actually experienced by a crime victim, against the permissible and carefully scrutinized defendant circumstances. The victim's voice gives life to the impact of the crime and justly reflects not only vindication for the individual victim, but for the society it

represents as well.

Crime victims should be recognized as parties with standing in all criminal sentencing hearings, including those in capital cases. Any potential for arbitrariness can effectively be screened by the court, following guidelines set out in Gregg v. Georgia, and read together with those promulgated by each state.

Respectfully submitted,

By:



Judith Rowland, Esq.

Crime Victims Legal Clinic

1221 22nd Street

San Diego, California 92102

BEST AVAILABLE COPY

No. 90-5721
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

PERVIS TYRONE PAYNE,

PETITIONER,

STATE OF TENNESSEE,

RESPONDENT.

v.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT**

**BRIEF OF THE APPELLATE COMMITTEE OF THE
CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION
AMICUS CURIAE IN SUPPORT OF THE STATE OF TENNESSEE**

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

IRA REINER

District Attorney

County of Los Angeles

Counsel of Record:

HARRY B. SONDEHIM

Head, Appellate Division

MARTHA E. BELLINGER

Deputy District Attorney

Of Counsel:

GEORGE G. SIZE

Deputy District Attorney

849 South Broadway, 11th Floor

Los Angeles, CA 90014-3570

Telephone: (213) 974-5911

TABLE OF CONTENTS

	<u>Pages</u>
BRIEF OF AMICUS CURIAE THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS OFFICE IN SUPPORT OF THE STATE OF TENNESSEE	1
INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	4
I THE PRINCIPLES OF STARE DECISIS SHOULD NOT PREVENT THE COURT FROM OVER-RULING <i>BOOTH V. MARYLAND</i>	5
A Stare Decisis Is Least Persuasive In Constitutional Cases, Such As The Case At Bar	6
B <i>Booth</i> Has Sown Confusion And Frustration Among The Lower Courts	12
II <i>BOOTH V. MARYLAND</i> WAS IMPROVIDENTLY DECIDED AND SHOULD BE OVERRULED	15
A The Common Law Has Always Considered Actual Harm Rather Than Basing Punishment Solely Upon The Defendant's Intent	15

B Common Principles Of Morality Dictate That The Amount Of Harm Done Does Bear On The Extent Of One's Personal Responsibility	21
CONCLUSION	23

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Pages</u>
Booth v. Maryland, 482 U.S. 496 (1987)	4-9, 11-17, 20-23
Duncan v. Louisiana, 391 U.S. 145 (1968)	8
Enmund v. Florida, 458 U.S. 782, 801 (1982)	16
Furman v. Georgia, 408 U.S. 238, 383 (1972)	8, 9
Gregg v. Georgia, 428 U.S. 153, 176 (1976)	8
Mitchell v. W.T. Grant Co., 416 U.S. 600, 627-628 (1974)	7
Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970)	6, 12
Ohio v. Huertas, 111 S.Ct. 805, 112 L.Ed.2d 837 (1991)	15
Patterson v. McLean Credit Union, 491 U.S. 164 [109 S.Ct.2363, 2371, 105 L.Ed.2d 132] (1989)	4-6, 12, 13
People v. Anderson, 52 Cal.3d 453, 474-475 (1990)	14

<u>CASES</u> (Continued)	<u>Pages</u>	<u>CASES</u> (Continued)	<u>Pages</u>
People v. Burton, 48 Cal.3d 843, 868-869 (1989), cert. denied, 110 S.Ct. 1502 (1990)	14	People v. McDonald, 189 Ill.App.3d 374, 545 N.E.2d 819, 825 (Ill.App. 1989)	15
People v. Carrera, 49 Cal.3d 291, 331, 777 P.2d 121 (1989)	13	People v. Rich, 45 Cal.3d 1036, 1089-1090, 755 P.2d 960 (1988)	13, 22
People v. Clark, 50 Cal.3d 583, 629, 789 P.2d 127 (1990)	14	People v. Siripongs, 45 Cal.3d 548, 580, 754 P.2d 1306 (1988)	13
People v. Crews, 112 Ill.2d 266, 522 N.E.2d 1167, 1177-1178 (1988)	14	People v. Stankewitz, 51 Cal.3d 72, 112, 793 P.2d 23 (1990)	14
People v. Douglas, 50 Cal.3d 468, 536-537 (1990)	14	South Carolina v. Gathers, 490 U.S. 805 (1989)	4, 13, 20
People v. Gordon, 50 Cal.3d 1223, 1266-1270, 792 P.2d 251 (1990)	14	State v. Fain, Idaho S.Ct. No. 18463, 1991 W.L. 27493 (Idaho March 7, 1991)	14, 15
People v. Jackson, 198 Ill.App.3d 831, 556 N.E.2d 619, 633-634 (Ill.App. 1990)	15	State v. Huertas, 51 Ohio St.3d, 553 N.E.2d 1058 (Ohio 1990)	15
People v. Kelly, 51 Cal.3d 931, 964 (1990)	14	State v. Paz, 118 Idaho 542, 798 P.2d 1, 15-17 (1990)	14
People v. Lewis, 50 Cal.3d 262, 284-285, 786 P.2d 892 (1990)	14	State v. Pizzuto, Idaho S.Ct. Nos. 16489, 17534, 1991 W.L. 2553 (Idaho January 15, 1991)	14
People v. Marshall, 50 Cal.3d 907, 928-929, 790 P.2d 676 (1990)	14	Tison v. Arizona, 481 U.S. 137 (1987)	16, 18, 19

<u>CASES</u> (Continued)	<u>Pages</u>	<u>UNITED STATES CODE</u> (Continued)	<u>Pages</u>
United States v. Feola, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed 2d 541 (1975)	17	Ariz. Rev. Stat. Ann. §§ 12-253(4), 13-702(D)(9) (Supp. 1987)	10
Webster v. Reproductive Health Services, 492 U.S. 490, 106 L.Ed.2d 410, 437-438 (1989)	6, 7	Col. Rev. Stat. § 16-11-102 (1986)	10
Weems v. United States, 217 U.S. 349, 378 (1910)	9	Conn. Gen. Stat. Ann. § 54-91 (1985)	10
Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)	8	Del. Code Ann. Title 11 §§ 4331(d) & (e) (1987)	10
Woodson v. North Carolina, 428 U.S. 280, 304 (1976)	7, 8, 12	Fla. Stat. Ann. § 921.143 (1985)	10
<u>STATE CODES AND STATUTES</u>			
Section 246.3	21	Id. Code § 19-5306 (1985)	10
Section 1191.1	10	Il. Stat. Ann. §§ 38-1406, 1005-4-1(6) (Supp. 1988)	10
Section 1203(h) (Supp. 1988)	10	Ind. Code Ann. §§ 35-38-2-8 & 9 (1985 & Supp. 1988)	10
<u>UNITED STATES CODE</u>			
71 Pa. Stat. § 180-9.3 (Supp. 1987)	10	Iowa Code Ann. § 901.3 (Supp. 1988)	10
Alaska Stat. § 12.55.022 (Supp. 1988)	10	Kan. Stat. Ann. § 21-4604(2) (Supp. 1987)	10
		Ky. Rev. Stat. §§ 421.500(5)(b), 421.520 (1985)	10
		La. Rev. Stat. § 46:1844(9) (Supp. 1986)	10
		Mass. Ann. Laws ch. 279 § 4B (Supp. 1988)	10
		Md. Code Ann. art. 41 § 4-609 (1987)	10
		Me. Rev. Stat. Ann. Title 17-A § 1257 (Supp. 1988)	10
		Mich. Stat. Ann. § 28.1287 (763) (764) (765)	10

<u>UNITED STATES CODE</u> (Continued)	<u>Pages</u>	<u>UNITED STATES CODE</u> (Continued)	<u>Pages</u>
Minn. Stat. Ann. §§ 609.115, 611A.037 (Supp. 1988)	10	Tenn. Code Ann. §§ 40-35-207(8), 40-35-209 (Supp. 1987)	10
Mo. Rev. Stat. § 595.203 (1986)	10	Tx. Stat. Ann. §§ 56.02, 56.03 (Supp. 1988)	10
Mont. Code Ann. § 46-18-112 (1987)	10	Va. Code Ann. § 19.2-299.1 (Supp. 1988)	10
Ms. Code §§ 99-19-151 to 161 (Supp. 1988)	10	Vt. Stat. Ann. Title 13 § 7006 (Supp. 1988)	10
N.C. Gen. Stat. §§ 15A-825, 15A-1340.4 (1987)	10	W. Va. Code §§ 61-11A-2 & 3 (1984)	10
N.D. Cent. Code ch. 12.1-34-02.14 (Supp. 1987)	10	Wash. Rev. Code § 7.69.030 (Supp. 1989)	10
N.J. Stat. Ann. § 2C:44-6.b (Supp. 1988)	10	Wis. Stat. Ann. § 950.04(2m) (Supp. 1988)	10
N.M. Stat. Ann. § 31-24-5 (1987)	10	Wy. Stat. §§ 7-13-303(a)(iv), 7-13-402 (e)(v) (1987)	10
N.Y. Crim. Proc. Law § 390.30(3b) (Supp. 1988)	10		
Neb. Rev. Stat. § 29-2261 (1985)	10		
Nev. Rev. Stat. § 176.145 (1987)	10	<u>UNITED STATES SUPREME COURT RULES</u>	
O.C.G.A. §§ 17-10-1.1, 1.2 (1985)	10	Rule 37.3	1
Ohio Rev. Code Ann. § 2947.051 (Supp. 1985)	10		
Okl. Stat. Ann. Title 22 § 982 (1986)	10		
Or. Rev. Stat. § 144.790(2), (4) (1983)	10	<u>MISCELLANEOUS</u>	
R.I. Gen. Laws §§ .2-28-4 to 4.3 (Supp. 1986)	10	Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1242	10
S.C. Code Ann. § 16-3-1550 (1985)	10	W.R. LaFave & A. Scott, Criminal Law §§ 7.1, 7.3-7.5 (2d ed. 1986)	18

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

PERVIS TYRONE PAYNE,

PETITIONER,

v.

STATE OF TENNESSEE,

RESPONDENT.

BRIEF OF *AMICUS CURIAE* THE APPELLATE COMMITTEE OF
THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION
IN SUPPORT OF THE STATE OF TENNESSEE

BRIEF OF *AMICUS CURIAE* THE APPELLATE COM-
MITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS
OFFICE IN SUPPORT OF THE STATE OF TENNESSEE

Amicus curiae, the Appellate Committee of the California District Attorneys Association, and Ira Reiner, District Attorney of Los Angeles County, are filing this brief accompanied by the written consent of all parties pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States.

//
//
//
//

INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorneys Association is a committee created by an association consisting of the District Attorneys of the State of California and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Los Angeles County. Upon review of the instant matter - which raises the issue of the admissibility of victim impact statements at capital proceedings - the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case shall likely have substantial impact upon the administration of

criminal justice throughout California. It is for this reason that the Committee seeks leave to file the attached *amicus curiae* brief herein.

Respectfully submitted
on behalf of the

California District Attorneys
Association, and the District Attorney
of Los Angeles County

IRA REINER
District Attorney
County of Los Angeles

By

Counsel of Record
HARRY B. SONDEHEIM
Head Deputy District Attorney
MARTHA E. BELLINGER
Deputy District Attorney
Appellate Division

Of Counsel
GEORGE G. SIZE
Deputy District Attorney

Attorneys for Amicus Curiae

SUMMARY OF ARGUMENT

Amicus files the instant brief in order to urge this Court to overrule its prior decisions in *Booth v. Maryland*, 482 U.S. 496 (1987) and, as a secondary matter, in *South Carolina v. Gathers*, 490 U.S. 805 (1989). Since the split votes on those cases suggest that a majority of the Court may believe that *Booth* was incorrectly decided, Section I of the brief focusses upon the reasons that stare decisis should *not prevent* the Court from overturning that case. Section II is concerned with the substantive reasons that *Booth* was incorrectly decided, but is also intended to show that *Booth* "poses a direct obstacle to the realization of important objectives embodied in other laws" and should therefore be overruled. *Patterson v. McLean Credit Union*, 491 U.S. 164 [109 S.Ct.2363, 2371, 105 L.Ed.2d 132] (1989).

Although the actual meaning of *Booth* has been the subject of considerable debate and disagreement, it is clear that the case seriously limits the admission of victim impact evidence at the penalty phase of capital cases. It is also clear that the basis of the majority's opinion is its conviction that the harm caused by a murderer may be considered in a death penalty case only insofar as the murderer directly intended to inflict that harm. But even a relatively elementary overview of the common law of homicide shows that defendants have long been held legally accountable for results well beyond their original intent. In fact, common law doctrines of felony murder, depraved heart murder, and murder committed while intent upon inflicting serious bodily injury, all presuppose such extended responsibility.

Furthermore, contrary to implications by the majority in *Booth*, as a society we hold each other responsible for results far beyond our direct intent in ordinary moral relations. In other words, the principle at stake here is not some arcane

notion of death-penalty jurisprudence. We are speaking here of concepts of responsibility which inform our common moral discourse. *Booth* ignores -- or, at least, sells short -- those concepts. Perhaps just for this reason, *Booth* has provoked both confusion and a sort of passive resistance among the lower courts.

As such, *Booth* is an aberration in the law, running against the grain of both the common law and the common moral wisdom. Its continued vitality (questionable since the decision was announced) only serves to undermine confidence in the reasonableness of the law, by raising doubts about the consistency and impartiality of this Court's jurisprudence in the highly charged and much-watched area of death penalty litigation. Therefore, both the consistency of the law and its moral suasion would best be served by overruling *Booth v. Maryland*.

I

THE PRINCIPLES OF STARE DECISIS SHOULD NOT PREVENT THE COURT FROM OVERRULING *BOOTH V. MARYLAND*

There can be no question of the important place of the principle of stare decisis in jurisprudence. It not only has predictive value, but also assures that reasoned principle, rather than personal sympathy, shall guide the law:

(S)tare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon "an arbitrary discretion."

Patterson v. McLean Credit Union, 491 U.S. 164 [109 S.Ct. 2363, 2370, 105 L.Ed.2d 132], quoting from *The Federalist*, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton).

But "stare decisis is a principle of policy and not a mechanical formula . . ." *Id.* at 109 S.Ct. 2370. To the extent that stare decisis acts to protect a coherent legal tradition or to harmonize the law with moral reasoning, it serves as a sort of guardian of consistency and predictability. But, to the extent that it acts to protect cases which are themselves at odds with that legal tradition, or which undermine sound moral reasoning, enforcement of stare decisis only erodes the values it is intended to foster.

As set forth in Section II, below, *Booth* is an anomaly in the legal tradition, departing from both common law jurisprudence and our ordinary notions of moral responsibility. Overruling it therefore will only support consistency and predictability in this area of law. It is a rare instance in which rejecting stare decisis will foster the values which adherence to precedent ordinarily protects: "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). This case presents one of those instances:

A

Stare Decisis Is Least Persuasive In Constitutional Cases, Such As The Case At Bar

Stare decisis is least powerful in constitutional cases, where, barring a constitutional amendment, this Court has final responsibility. When this Court rules a practice unconstitutional, the effect of such a ruling is to declare that "the Constitution puts [the issue] beyond the reach of the democratic process." *Webster v. Reproductive Health Services*,

492 U.S. 490, 106 L.Ed.2d 410, 437-438 (1989). In light of this great consequence, the Court "ha[s] not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.'" *Id.*, at 106 L.Ed.2d 435.

As Justice Powell stated,

[Stare decisis] has never been thought to stand as an absolute bar to reconsideration of a prior decision, especially with respect to matters of constitutional interpretation. . . . It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand. . . . [A] constitutional decision of this Court should be "always open to discussion when it is supposed to have been founded in error, [so] that [our] judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

Mitchell v. W.T. Grant Co., 416 U.S. 600, 627-628 (1974) (Powell, J., concurring) [footnote omitted], quoting from *Passenger Cases*, 7 How 283, 470, 12 L.Ed 702 (1849) (Taney, C.J.)

Booth v. Maryland should be subject to special scrutiny because it intrudes into two areas with which the courts, on Constitutional grounds, have long been hesitant to interfere. First, the effect of *Booth* is to remove a whole class of evidence from consideration by the jury. At the same time that *Booth* prescribes that the "jury is required to focus on the defendant as a 'uniquely individual human bein[g],' *Booth*, at 504, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976),

it prevents the jury from hearing evidence of the harm done to the victim and the victim's family, as "uniquely individual human beings."¹ As such, it skews the evidence presented to the jury by reducing the victim to an abstraction. If the right to a jury trial is truly "fundamental to our system of justice," *Duncan v. Louisiana*, 391 U.S. 145 (1968), surely that presupposes a fundamental trust in the jury to weigh both sides, fairly presented. While there are certainly appropriate circumstances for limitations on prejudicial or irrelevant evidence, the Court should be particularly reluctant to censor the evidence so that "one side [is] muted." *Booth*, at 519 (Scalia, J., dissenting). Likewise, the Court should be particularly open to reconsidering a decision which has erroneously limited such a fundamental right of both sides.

Second, decisions regarding the appropriate considerations to be taken into account in sentencing are "peculiarly questions of legislative policy." *Gregg v. Georgia*, 428 U.S. 153, 176 (1976). As Justice White urged in his dissent in *Booth*, "the Court should recognize that "[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."² *Booth v. Maryland*, 482 U.S. at 515, quoting *Gregg v. Georgia*, 428 U.S. at 175 [quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)].

Finally, *Booth's* foundation in the Eighth Amendment is questionable at best. That the admission of evidence such as *Booth* forbids finds no prohibition in the historical bases of the "Cruel and Unusual Punishments" clause need not be belabored.

1. It should be noted that the majority in *Booth* never offers appropriate authority for the proposition that the jury's attention should focus *entirely* on the defendant. Certainly neither of the cases cited by the majority in that portion of the opinion – *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), nor *Woodson v. North Carolina* – stand for that proposition.

Nor is that fact alone offered, in any sense, as a reason that *Booth* is incorrectly decided. As the Court correctly observed in *Furman v. Georgia*, 408 U.S. 238, 265:

Had this "historical" interpretation of the Cruel and Unusual Punishments Clause prevailed, the Clause would have been effectively read out of the Bill of Rights.

It does not follow from this, however, that the members of this Court are therefore free to discover in that Clause their own personal moral convictions, no matter how profoundly held. Such an approach would just as effectively "read into the Bill of Rights" the sort of "arbitrary discretion" which works to undermine judicial authority. As the Court also emphasized in *Furman v. Georgia*:

We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked.

Id. at 267-268, quoting *Weems v. United States*, 217 U.S. 349, 378 (1910); emphasis added.

But if legal duty rather than personal conscience is at issue in discovering the contemporary meaning of the Constitutional prohibition against "cruel and unusual punishments" then the place to look for that duty ought to be in contemporary moral and legal values, as established and tested in the common law tradition. Yet, it is precisely upon these grounds that *Booth* most obviously founders. Certainly, *Booth* can find little

support in contemporary concerns in this area of law. The vast majority of states, as well as the federal government, have adopted victim's rights legislation, providing for the consideration of the impact of crime upon victims at the time of sentencing.² As a recent law review comment noted:

2. See, Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1242; Alaska Stat. § 12.55.022 (Supp. 1988); Ariz. Rev. Stat. Ann. §§ 12-253(4), 13-702(D)(9) (Supp. 1987); Cal. Penal Code §§ 1191.1 & 1203(h) (Supp. 1988); Col. Rev. Stat. § 16-11-102 (1986); Conn. Gen. Stat. Ann. § 54-91 (1985); Del. Code Ann. Title 11 §§ 4331(d) & (e) (1987); Fla. Stat. Ann. § 921.143 (1985); O.C.G.A. §§ 17-10-1.1, 1.2 (1985); Id. Code § 19-5306 (1985); Ill. Stat. Ann. §§ 38-1406, 1005-4-1(6) (Supp. 1988); Ind. Code Ann. §§ 35-38-2-8 & 9 (1985 & Supp. 1988); Iowa Code Ann. § 901.3 (Supp. 1988); Kan. Stat. Ann. § 21-4604(2) (Supp. 1987); Ky. Rev. Stat. §§ 421.500(5)(b), 421.520 (1985); La. Rev. Stat. § 46:1844(9) (Supp. 1986); Me. Rev. Stat. Ann. Title 17-A § 1257 (Supp. 1988); Md. Code Ann. art. 41 § 4-609 (1987); Mass. Ann. Laws ch. 279 § 4B (Supp. 1988); Mich. Stat. Ann. § 28.1287 (763) (764); Minn. Stat. Ann. §§ 609.115, 611A.037 (Supp. 1988); Mo. Code §§ 99-19-151 to 161 (Supp. 1988); Mo. Rev. Stat. § 595.203 (1986); Mont. Code Ann. § 46-18-112 (1987); Neb. Rev. Stat. § 29-2261 (1985); Nev. Rev. Stat. § 176.145 (1987); N.J. Stat. Ann. § 2C:44-6.b (Supp. 1988); N.M. Stat. Ann. § 31-24-5 (1987); N.Y. Crim. Proc. Law § 390.30(3b) (Supp. 1988); N.C. Gen. Stat. §§ 15A-825, 15A-1340.4 (1987); N.D. Cent. Code ch. 12.1-34-02 14 (Supp. 1987); Ohio Rev. Code Ann. § 2947.051 (Supp. 1985); Okla. Stat. Ann. Title 22 § 982 (1986); Or. Rev. Stat. § 144.790(2), (4) (1983); 71 Pa. Stat. § 180-9.3 (Supp. 1987); R.I. Gen. Laws §§ 12-28-4 to 4.3 (Supp. 1986); S.C. Code Ann. § 16-3-1550 (1985); Tenn. Code Ann. §§ 40-35-207(8), 40-35-209 (Supp. 1987); Tex. Stat. Ann. §§ 56.02, 56.03 (Supp. 1988); Vt. Stat. Ann. Title 13 § 7006 (Supp. 1988); Va. Code Ann. § 19.2-299.1 (Supp. 1988); Wash. Rev. Code § 7.69.030 (Supp. 1989); W. Va. Code §§ 61-11A-2 & 3 (1984); Wis. Stat. Ann. § 950.04(2m) (Supp. 1988); Wy. Stat. §§ 7-13-303(a)(iv), 7-13-402 (c)(v) (1987).

The prevalence of victim impact statements reveals several assumptions about the purposes of punishment. Punishing the defendant according to the degree of harm caused the victim achieves two utilitarian goals: it permits the victim and society to express their outrage at the evil the defendant has caused, and it incrementally deters the underlying criminal conduct. In addition, it is widely believed that achieving the retributive goal of inflicting a "fair" or "deserved" punishment necessitates some considerations of post-crime victim suffering.

Comment, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 CHI. L.REV. 1303, 1304 (1988).

More generally, consideration of the harm done by the crime, both to the victim and to society, is common in sentencing. Nor is this some archaic survival from past ages. For example, in setting the standards for the United States Sentencing Commission in its drafting of the new Federal Sentencing Guidelines, Congress prescribed that the Commission shall consider, among other factors:

The nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust

28 U.S.C. 994(c)(3).

Neither (as set forth in Section II, below) does *Booth* find support in the common law tradition generally, or the law of murder, in particular. The majority in *Booth* seems to acknowledge that its view does not reflect common practice in non-capital cases:

While the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing.

Booth, at 504.

It is certainly true that the death penalty is "a punishment different from all other sanctions." *Booth*, at 509 fn. 12, quoting *Woodson v. North Carolina*, 428 U.S. at 303-304. But that does not explain *why* consideration of victim impact evidence is appropriate in other cases, but not in the cases involving the death penalty. The problem is that the majority does not explain from legal principles or moral reason, nor set forth convincing authority, such as to justify its departure from past practice. Surely, a generalized "ambivalence" about the death penalty is not sufficient to render whole categories of evidence irrelevant.

In the absence of a reasoned explanation firmly grounded in legal or moral principle, *Booth* only serves to undermine that "public faith in the judiciary as a source of impersonal and reasoned judgments" which underlies the principle of stare decisis. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

B

Booth Has Sown Confusion And Frustration Among The Lower Courts

As the Court observed in *Patterson*, a "traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable

decision, . . . or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws." *Patterson v. McLean Credit Union*, 491 U.S. 164 [109 S.Ct. 2363, 2371, 105 L.Ed.2d 132].

The confusion engendered by *Booth* and its progeny is well illustrated in amicus' home state of California, where the state supreme court has interpreted *Booth* one way, then another, until finally seeming to settle on a course which obviates the obstacle of '*Booth* error' by finding it consistently harmless.

In its initial attempts at understanding *Booth*, the California Supreme Court concluded that it restricted only evidence, not argument:

We note[] that the United States Supreme Court has held formal *evidence* on the impact of a crime on the victim's family to be inadmissible and improper, but that mere *argument*, *without instructions* on that subject, may not be prohibited by *Booth*.

People v. Siripongs, 45 Cal.3d 548, 580, 754 P.2d 1306 (1988), cert. denied 488 U.S. 1019 (1989) [emphasis in original; citation of *Booth* omitted]; see also, *People v. Rich*, 45 Cal.3d 1036, 1089-1090, 755 P.2d 960 (1988).

Then this Court decided *South Carolina v. Gathers*, which, of course, focussed precisely upon "mere argument" of victim impact by the prosecutor (as in *Siripongs*) and found such to be prohibited.

Going back to the drawing-board, the California Supreme Court next sought to distinguish *Booth* as little more than a gloss upon the rule disfavoring prejudicial evidence. In *People v. Carrera*, 49 Cal.3d 291, 331, 777 P.2d 121 (1989), the

California court addressed testimony by the victim's mother at the penalty phase:

Although the United States Supreme Court in *Booth v. Maryland* [citation omitted] held evidence of a murder victim's character to be irrelevant to a capital sentencing decision and its admission error, the court did not alter the analysis for the admission of evidence generally or bar the testimony of a victim's relative where that testimony is more probative than prejudicial.

Id. at 331, fn.28.

In subsequent cases, the California Supreme Court has abandoned this interpretation of *Booth*. But after finding, in case after case, that *Booth* had been violated, the court has consistently proceeded to find that the error was harmless beyond a reasonable doubt -- thus honoring *Booth* more in the breach than in the observance. See, *People v. Anderson*, 52 Cal.3d 453, 474-475 (1990); *People v. Kelly*, 51 Cal.3d 931, 964 (1990); *People v. Stankewitz*, 51 Cal.3d 72, 112, 793 P.2d 23 (1990); *People v. Clark*, 50 Cal.3d 583, 629, 789 P.2d 127 (1990); *People v. Gordon*, 50 Cal.3d 1223, 1266-1270, 792 P.2d 251 (1990); *People v. Marshall*, 50 Cal.3d 907, 928-929, 790 P.2d 676 (1990); *People v. Lewis*, 50 Cal.3d 262, 284-285, 786 P.2d 892 (1990); *People v. Douglas*, 50 Cal.3d 468, 536-537 (1990); *People v. Burton*, 48 Cal.3d 843, 868-869 (1989), cert. denied, 110 S.Ct. 1502 (1990).

Similar tendencies are apparent in other states, as well. See, e.g., *State v. Fain*, Idaho S.Ct. No. 18463, 1991 W.L. 27493 (Idaho March 7, 1991) (WESTLAW, Allstates library); *State v. Pizzuto*, Idaho S.Ct. Nos. 16489, 17534, 1991 W.L. 2553 (Idaho January 15, 1991); *State v. Paz*, 118 Idaho 542, 798 P.2d 1, 15-17 (1990); *People v. Crews*, 112 Ill.2d 266, 522

N.E.2d 1167, 1177-1178 (1988); *People v. Jackson*, 198 Ill.App.3d 831, 556 N.E.2d 619, 633-634 (Ill.App. 1990); *People v. McDonald*, 189 Ill.App.3d 374, 545 N.E.2d 819, 825 (Ill.App. 1989).

One state court justice, noting the pattern in his own state, has denounced the "[i]ndiscriminate use of the harmless error doctrine" as a detour around the obstacle posed by *Booth*. *State v. Fain*, 1991 W.L. 27493, slip op. at p.6 (Idaho March 7, 1991) (Bistline, J., dissenting). On the other hand, the alternative -- trying to understand and apply *Booth* -- is one which has stumped more than one state court, as illustrated, not only by many of the cases cited above, but also by *State v. Huertas*, 51 Ohio St.3d, 553 N.E.2d 1058 (Ohio 1990), recently before this Court. See, *Ohio v. Huertas*, 111 S.Ct. 805, 112 L.Ed.2d 837 (1991), cert. dismissed as improvidently granted. Finally, if the lower court concludes that *Booth* is applicable, its judges are left in a position they may find the most objectionable of all: reversing a capital case because the trial court allowed the victim to become something more than an abstraction to the jury, in violation of *Booth*. As set forth below, neither their legal backgrounds nor their common moral assumptions incline judges to embrace such a doctrine.

**BOOTH V. MARYLAND WAS IMPROVIDENTLY
DECIDED AND SHOULD BE OVERRULED**

A

The Common Law Has Always Considered Actual
Harm Rather Than Basing Punishment Solely Upon
The Defendant's Intent

The Court in *Booth v. Maryland* determined that victim impact evidence is unconstitutionally inadmissible during the penalty phase of a capital proceeding because the information contained therein has nothing to do with the defendant's culpability. Citing to its decision in *Enmund v. Florida*, 458 U.S. 782, 801 (1982), the majority in *Booth* underlined its position that only that information which bore directly upon the defendant's "personal responsibility and moral guilt" would be admissible at a capital sentencing proceeding. *Booth*, 482 U.S. at 502. The *Booth* court concluded that victim impact statements presented factors which "may be wholly unrelated to the blameworthiness of a particular defendant." *Id.* at 504.

While the Court in *Booth* hinted that the criminal law may well be willing to consider as relevant the actual foreseeable harm caused by the defendant in "other criminal and civil contexts," it was not willing to "agree that it is relevant in the unique circumstance of a capital sentencing hearing." *Id.* at 504. Although conceding that the Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987), made capital defendants morally culpable for more than just the harm they specifically intended, it appears the *Booth* Court nevertheless was unwilling to abandon the notion that criminal responsibility should largely remain uninformed by the harm caused. *Booth* at 504.

As one law review author has expressed:

[T]he most serious flaw in the *Booth* Court's reasoning is its failure to recognize the *eligibility* for the death penalty always depends upon the harm that results [T]he criminal law categorizes punishments according to actual results. Thus, to reject the degree of harm inflicted as irrelevant, when divorced from the defendant's intentions, is to reject a principle that pervades the criminal justice system.

Comment, The Significance of Victim Harm: *Booth v. Maryland* and the Philosophy of Punishment in the Supreme Court, 55 U. CHI. L. REV. 1301, 1325-26 (1988).

As Justice White emphasized in his dissent in *Booth*, this Court has in other cases "indicate[d] that the harm caused by an offense may be the basis for punishment even if the offender lacked the specific intent to commit the harm. See, e.g., *United States v. Feola*, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed 2d 541 (1975) . . ." *Booth* at 517 n.1. Indeed, the majority in *Booth* recognized that the harm caused to society "may be relevant in other criminal contexts" but not in "the unique circumstance of a capital sentencing hearing." *Booth* at 504. The *Booth* decision appears to make no principled distinction between capital and non-capital cases in the admission of evidence as to the impact of the defendant's actions upon society. While every human life is important and we will punish any one who takes any life unjustifiably, obviously there is a greater impact upon society when a President is killed than when the average citizen is killed. See *Booth* at 517 n.2 (White, J., dissenting).

The criminal law has always incorporated within its theory of moral culpability the concept that a defendant may be held accountable not only for the intention of his act alone but also

for the harm he has caused. No where is this more evident than in the common law concepts of murder.

Classically, murder involved but one factual scenario - an individual intended to kill his victim and accomplished that end. Soon, however, English jurists recognized that life could be taken by another in circumstances in which the defendant did not intend to kill but in which his actions were so inherently dangerous to human life, that it was perceived to be unconscionable to fail to hold the defendant responsible for the harm caused to the victim. Consequently, the English jurists developed three new forms of murder in which malice would be implied from the defendant's conduct, and the defendant would be held accountable for the harm he caused to the victim even though he had never specifically intended the death of that victim. Felony murder, depraved heart murder, and intent-to-do-serious-bodily-injury short of death became new theories of murder. See W.R. LaFave & A. Scott, *Criminal Law* §§ 7.1, 7.3-7.5 (2d ed. 1986).

With intent-to-do-serious-bodily-injury murder a person would be guilty of murder if the death resulted from an act intended to cause great bodily injury. The unintended killing was determined to be sufficiently within the scope of the risk intentionally created by the defendant so as to make him liable for murder even though he had not intended that result. This type of commonlaw murder became a part of the law of murder in America. *Id.* § 7.3, at p. 616. Just as this form of murder makes a defendant legally culpable for the death of another even when it was not intended, so it is entirely appropriate to hold a defendant accountable for the foreseeable but unintended impact of his murder upon the victim's family and upon the community as a whole.

Similarly, the depraved heart form of murder holds a defendant accountable for the killing done with a wanton

disregard for the strong likelihood that death or great bodily injury will result from the defendant's conduct although the killing of the victim was not specifically intended by the defendant. Here, again, the defendant is held morally culpable for the result of his conduct and the harm he has caused the victim regardless of the intention of his act. *Id.* § 7.4, at pp. 617-621.

The Court in *Tison v. Arizona*, 481 U.S. 137, recognized that one who acts with a reckless disregard for human life represents a highly culpable mental state that may support a capital sentencing judgment in combination with major participation in the felony resulting death. *Id.* at 157. Although petitioners in *Tison* argued that since they did not themselves intend to kill the hapless family which had stopped by the wayside to assist petitioners, and should not be held accountable for the victims' deaths, this Court ruled that even though a murder was not specifically intended by the defendants, a reckless disregard for human life which resulted in the death of the victim could be the basis for the death penalty even though the "lethal result" was not an "inevitable" result of the conduct. *Id.* at 158. Clearly this Court in *Tison* recognized that defendants should be criminally liable for the harm they caused.

Felony murder at early common law held a felon morally culpable for an unintended death which occurred during the commission or attempted commission of a felony. While the felony murder doctrine has been refined and limited in many American jurisdictions, "the felony-murder doctrine is well entrenched in American law." W.R. LaFave & A. Scott, *Criminal Law* § 7.5, p. 640 (2d ed. 1986). Under this doctrine one committed a felony at one's own risk and with the understanding that one would be criminally liable for all deaths caused by one's commission of the felony. The theory of punishment underlying the felony murder rule was that it would serve as a deterrent to the commission of felonies or at

least the commission of felonies in violent ways. The felon was acting with the risk that a death might occur which he did not intend but for which he would be held strictly accountable.

The common law through the crime of attempt has long recognized that intent alone is not enough to create criminal liability and that the result of the criminal enterprise is determinative of proper punishment. The criminal law has always recognized that one who attempts to commit murder but fails to accomplish that end will be punished, but never to the extent of one who succeeds. While both the murderer and the attempt murderer have the same intent, the criminal law gives the greatest sanction to the defendant who causes the greatest harm. "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." *Booth v. Maryland*, 482 U.S. 496 (Scalia, J., dissenting). "The only distinction is the harm to the community which results from the defendant's actions, and this distinction is deemed sufficient to support a difference in punishment between a sentence of years and the ultimate penalty." *South Carolina v. Gathers*, 109 S.Ct. 2207, 2215 (1989) (O'Connor, J., dissenting).

The doctrine of legal impossibility also demonstrates how the intent of the actor alone is not enough to create criminal liability. This doctrine holds that one is not guilty of an attempt to a crime if the actual result intended is not proscribed by the criminal law. "[A]n immoral motive to inflict some injury on one's fellows coupled with a misapprehension about the content of the criminal law are not good reasons for conviction." W.R. LaFave & A. Scott, *Criminal Law*, § 6.3, p. 514 (2d ed. 1986). Again, through the doctrine of legal impossibility, the criminal law affirms the premise that it is the

harm of the criminal endeavor that matters, not just the intent to cause the harm.

The criminal law as enforced throughout the United States is replete with examples where the punishment assessed the criminal is directly dependent upon the harm caused and not the moral culpability of the defendant. As a member of this court has observed, a motorist who runs a stoplight and kills someone will receive far greater punishment than a motorist who merely runs a red light without injury. The two motorists share the same moral culpability but not the same punishment merely because the harm caused by the former far exceeds the harm caused society by the actions of the latter. *Booth v. Maryland*, 482 U.S. at 517 (White, J., dissenting). Likewise, in California, one man may shoot a gun into the air to celebrate New Year's Eve and be in violation of a statute which punishes such dangerous conduct, but if the bullet he has discharged into the air returns to earth and kills a young child, he may be held accountable for criminally negligent homicide although his intent was but to celebrate New Year's Eve, albeit in a dangerous mode. The gun shooter is such a circumstance is being directly punished for the harm he has caused and not the intent of his actions. California Penal Code section 246.3.

Thus, *Booth* divorces capital offenses from the consistent notion running through the common law that a defendant's criminal liability is measured to a large extent by the result of his conduct. Indeed, "[t]he goal of truly 'individualized' punishment . . . should allow the State to include as a capital sentencing consideration the particularized harm caused by an individual murder." Note, *Booth v. Maryland -- Death Knell For the Victim Impact Statement*, 47 MD.L.REV. 701, 713 (1988).

Common Principles Of Morality Dictate That The Amount Of Harm Done Does Bear On The Extent Of One's Personal Responsibility

To argue that one's responsibility for one's acts should be limited only to the intention of the act alone and remain uninformed by the harm caused is to divorce the criminal law from the common principles of morality operative in our society. It is to disregard the inestimable circumstances of every day life where one is held liable for the harm caused by one's actions. For example, if two boys go to play catch on a neighbor's property, where they know they are forbidden to play because of nearby windows, they may be concerned about being caught. But the concern of both the boys and their elders will be suddenly transformed if a negligently thrown ball smashes one of those windows. The fact of the ball going through the window, although quite unintentional, transforms the situation. Even relatively young children in such a circumstance would recognize in a flash that they bear responsibility for that broken window, although they did not intend to break it. The situation becomes that much more a cause for concern if the ball not only breaks the window but beans the neighbor inside the house. And if the neighbor happens to be a little old lady with brittle bones, the situation has the potential for tragedy -- for the boys, as well as for the old lady.

Yet, in all four scenarios, the youngsters intent was the same -- intentionally to play catch in a place they were not supposed to. But their degree of responsibility is very much dependent upon the degree of harm done, though not because that harm was intended. Indeed, one of the greatest principles we attempt to impart to our children is that they must accept the consequences of their behavior, and this often includes

suffering sanctions for the unintended results of both negligent and miscreant acts.

The point of this rather homely example is not to minimize the weighty issues presented by *Booth*. Still less is it to suggest that intention is irrelevant to personal responsibility. It is not. The point is rather to emphasize how singularly inadequate is the moral world, as it is conceived of in *Booth*, compared to flesh-and-blood reality. We are concerned in the case at bar with basic notions of legal and moral responsibility -- notions which *Booth* simply fails to capture. By contrast, the richness of our settled traditions of the common law and our ordinary moral discourse partake of profound and incisive wisdom. We cut ourselves off from their lessons at our peril.

CONCLUSION

Booth v. Maryland was incorrectly decided. It is unsupported by prior constitutional jurisprudence. It is consistent neither with common law tradition nor with the moral underpinnings of our society. Its continued viability serves only to confuse and undermine the legitimate goals of the law. For the reasons set forth above, *Booth* should be overruled.

Respectfully submitted on behalf of the
California District Attorneys
Association, and the District Attorney
of Los Angeles County

By

Counsel of Record
HARRY B. SONDEHEIM
Head Deputy District Attorney
Appellate Division

MARTHA E. BELLINGER
Deputy District Attorney
Associate Counsel

Of Counsel
GEORGE G. SIZE
Deputy District Attorney
Associate Counsel

Attorneys for Amicus Curiae

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the admission of "victim impact" evidence in the sentencing phase of a capital murder trial violates the Eighth and Fourteenth Amendments.
2. Whether *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), should be overruled.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT:	
I. <i>BOOTH AND GATHERS SHOULD BE OVERRULED BECAUSE THEY REPRESENT THE APOTHEOSIS OF A FLAWED JURISPRUDENCE OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE</i>	4
A. The Punishments Clause Was Originally Understood Solely As a Prohibition of Torture and Other Barbarous Punishments	4
B. In This Century, the Court Has Improperly Substituted Ideology for History in Its Interpretation of the Punishments Clause	7
C. Disregarding Justice Harlan's Warning in <i>McGautha</i> , the Court Has Erected an Illegitimate Edifice of Constitutional Doctrine for Regulating Capital Punishment	13

D. The Court's Illegitimate Jurisprudence of the Punishments Clause Has Culminated in the Holdings of *Booth* and *Gathers* that Victim Impact Evidence Cannot be Considered in Capital Sentencing 19

II. ALTERNATIVELY, *BOOTH* AND *GATHERS* SHOULD BE OVERRULED BECAUSE THEY ARE ERRONEOUS EVEN IN THE CONTEXT OF THE COURT'S OTHER DECISIONS UNDER THE PUNISHMENTS CLAUSE 23

A. There is No General Constitutional Impediment to According a Victim Standing to Participate in the Criminal Process, Including Sentencing 23

B. Victim Participation Serves Important Social Purposes 26

 1. Victim Involvement in the System Discourages Vigilantism 26

 2. A Right of Victim Participation Encourages Cooperation with Police and Prosecutors 27

 3. Participation in the Criminal Justice System Helps to Remedy the Traumatic Effects of Crime on the Victim 29

CONCLUSION 30

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Badders v. United States</i> , 240 U.S. 391 (1916)	8
<i>Blystone v. Pennsylvania</i> , 110 S. Ct. 1078 (1990) . . .	15
<i>Booth v. Maryland</i> , 482 U.S. 496 (1987)	<i>passim</i>
<i>Browning-Ferris Industries of Vermont, Inc.</i>	
v. <i>Kelco Disposal, Inc.</i> , 109 S. Ct. 2909 (1989) . . .	12
<i>California v. Brown</i> , 479 U.S. 538 (1987)	25
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	16, 17
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	2
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	<i>passim</i>
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	3, 6, 14, 25
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985)	13
<i>In re Kemmler</i> , 136 U.S. 436 (1890)	6
<i>Linda R. S. v. Richard D.</i> , 410 U.S. 614 (1973) . . .	24
<i>Lochner v. New York</i> , 198 U.S. 45 (1905)	10, 11
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	15, 16, 17
<i>McGautha v. California</i> ,	
402 U.S. 183 (1971)	3, 12, 13, 14
<i>McKoy v. North Carolina</i> ,	
110 S. Ct. 1227 (1990)	16
<i>Mills v. Maryland</i> , 486 U.S. 367 (1988)	19
<i>O'Neil v. Vermont</i> , 144 U.S. 323 (1892)	9
<i>Powell v. Texas</i> , 392 U.S. 514 (1968)	3
<i>Roberts (Harry) v. Louisiana</i> ,	
431 U.S. 633 (1977)	15
<i>Roberts (Stanislaus) v. Louisiana</i> ,	
428 U.S. 325 (1976)	15, 17
<i>Rummel v. Estelle</i> , 445 U.S. 263 (1980)	6
<i>Solem v. Helm</i> , 463 U.S. 277 (1983)	6, 9
<i>South Carolina v. Gathers</i> ,	
490 U.S. 805 (1989)	2, 19, 20

	Page
<i>Stanford v. Kentucky</i> ,	
492 U.S. 361 (1989)	25
<i>State v. Payne</i> ,	
791 S.W.2d 10 (Tenn. 1990)	2, 3
<i>Sumner v. Shuman</i> , 483 U.S. 66 (1987)	15
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958)	3, 8, 9
<i>Weems v. United States</i> ,	
217 U.S. 349 (1910)	7, 8, 9, 12
<i>Wilkerson v. Utah</i> , 99 U.S. 130 (1879)	6
<i>Williams v. New York</i> ,	
337 U.S. 241 (1949)	17
<i>Woodson v. North Carolina</i> ,	
428 U.S. 280 (1976)	15, 16, 17
<i>Young v. U.S. ex rel Vuitton et Fils</i> ,	
107 S. Ct. 2124 (1987)	25
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	20
U.S. Constitutional Provisions:	
Amendment V	7
Amendment VIII	<i>passim</i>
Amendment XIV, § 1	7, 14
Statutes:	
English Bill of Rights of 1689	4
Virginia Declaration of Rights 1776	4
Northwest Ordinance 1787	4
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837(1984)	18

Miscellaneous:

	Page
American Bar Association, Guidelines for Fair Treatment of Victims and Witnesses in the Criminal Justice System (1983)	26
Benson, <i>The Last Victim and Other Failures of the Public Law Experiment</i> , 9 Harv. J.L. & Pub. Pol'y 399 (1986)	24
R. Berger, <i>Death Penalties: The Supreme Court's Obstacle Course</i> (1982)	5, 6, 7, 9
W. Berns, <i>For Capital Punishment</i> (1979)	21
A. Bickel, <i>The Supreme Court and the Idea of Progress</i> (1970)	11
The Bureau of Justice Statistics, U.S. Dep't of Justice Report to the Nation on Crime and Justice (2d ed. 1988)	28
J.B. Bury, <i>The Idea of Progress</i> (1932 ed.)	10
Cardenas, <i>The Crime Victim in the Prosecutorial Process</i> , 9 Harv. J.L. & Pub. Pol'y 357 (1986)	24
F. Carrington & G. Nicholson, <i>The Victims Movement: An Idea Whose Time Has Come</i> , 11 Pepperdine L. Rev. 1 (1984)	27
Gardner, <i>The Renaissance of Retribution--An Examination of Doing Justice</i> , 1976 Wis. L. Rev. 781 (1976)	23
Gibbons, <i>Victim Again: Survivors Suffer Through Capital Appeals</i> , 74 A.B.A. J. 64 (Sept. 1988)	30
Gittler, <i>Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems</i> , 11 Pepperdine L. Rev. 117 (1984)	24, 28

	Page
Goldstein, <i>The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982</i> , 47 Law & Contemp. Probs. 225 (1984)	24
Granucci, "Nor Cruel and Unusual Punishments Inflicted:" <i>The Original Meaning</i> , 57 Calif. L. Rev. 839 (1969)	5, 6, 8, 9
Green, <i>Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute</i> , 97 Yale L.J. 488 (1988)	24
J. Herndon & B. Forst, <i>The Criminal Justice Response to Victim Harm</i> (1984)	29
O.W. Holmes, <i>The Common Law</i> (1923 ed.)	21, 22
Hudson, <i>The Crime Victim and the Criminal Justice System: Time for a Change</i> , 11 Pepperdine L. Rev. 23 (1984)	28
P. Johnson, <i>Modern Times: The World From the Twenties to the Eighties</i> (1983)	11
S. Kadish, S. Schulhofer & M. Paulsen, <i>Criminal Law and Its Processes</i> (4th ed. 1983)	18
Kelly, <i>Victims' Perceptions of Criminal Justice</i> , 11 Pepperdine L. Rev. 15 (1984)	28
Kilpatrick & Otto, <i>Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning</i> , 34 Wayne L. Rev. 7 (1987)	28, 29, 30
W. LaFave & A. Scott, <i>Criminal Law</i> , (2d ed. 1986)	23
Lowe, <i>Modern Sentencing Reform: A Preliminary Analysis of the Proposed Federal Sentencing Guidelines</i> , 25 Am. Crim. L. Rev. 1 (1987)	18
McLeod, <i>An Examination of the Victim's Role at Sentencing: Results of a Survey of Probation Administrators</i> , 71 JUDICATURE 162 (1987)	26
Mikva, <i>Victimless Justice</i> , 71 J. Crim. L. & Criminology 189 (1981)	28

	Page
National Organization for Victim Assistance, Victims Rights and Services: A Legislative Directory (1987)	27
N.Y. Times, Jan. 27, 1985, Sec. 4 at 20, col. 1	27
Note, <i>The Outmoded Concept of Private Prosecution</i> , 25 Am. U.L. Rev. 754 (1976)	24
Note, <i>Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction</i> , 65 Yale L.J. 209 (1955)	24
Note, <i>VIS: Reform or Reprisal</i> , 27 Am. Crim. L. Rev. 391 (1989)	26
Ogletree, <i>The Death of Discretion? Reflections on the Federal Sentencing Guidelines</i> , 101 Harv. L. Rev. 1938 (1988)	18, 22, 23
Packer, <i>Making the Punishment Fit the Crime</i> , 77 Harv. L. Rev. 1071 (1964)	18
Pineda, "Civilization and Cultural Evolution," 4 Encyclopedia Britannica 657 (15th ed. 1982) . .	10
G. Smith, <i>Capital Punishment 1986: Last Lines of Defense</i> (1986)	13
H. Spencer, <i>Social Statistics</i>	10
K. Starr, "The Impetus for Sentencing Reform in the Criminal Justice System," in <i>Crime and Punishment in Modern America</i> (P. McGuigan & J. Pascale, eds. 1986)	18
J. Story, <i>Commentaries on the Constitution of the United States</i> vi (Carolina Academic Press ed. 1987)	12
Task Force on the Victims of Crime and Violence, <i>Final Report of the APA Task Force on the Victims of Crime and Violence</i> , 40 Am. Psych. 107 (1985)	29, 30
Wheeler, <i>Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment</i> , 24 Stan. L. Rev. 838 (1972)	21

**BRIEF OF THE WASHINGTON LEGAL
FOUNDATION, MARY AND JOSEPH ZVOLANEK,
FAMILIES AND FRIENDS OF MISSING PERSONS
AND VIOLENT CRIME VICTIMS, THE NATIONAL
VICTIM CENTER, PARENTS OF MURDERED
CHILDREN, PEOPLE AGAINST CHILD ABUSE,
INC. AND THE STEPHANIE ROPER COMMITTEE,
INC. AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENT**

INTERESTS OF *AMICI CURIAE*

The *amici* are individuals and organizations concerned with promoting victims' rights in the criminal justice system. Included among the *amici* are Mary and Joseph Zvolanek, the parents of Charisse Christopher and the grandparents of Lacie Christopher, the two individuals whom Petitioner Pervis Payne was convicted of murdering. The Zvolaneks now have custody of Nicholas Christopher, Charisse Christopher's sole surviving child who was three years old at the time of the murders. Mary Zvolanek testified at the sentencing phase of Petitioner's trial regarding the harm inflicted on Nicholas due to the deaths of his mother and sister. Petitioner has asked this Court to hold that the admission into evidence of Mary Zvolanek's testimony violated his constitutional rights. A further description of the organizational *amici* is set forth in the Appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court has granted certiorari to consider whether its judicially-imposed prohibition on the use of victim impact evidence in the sentencing phase of a capital murder case should be overruled. This question is presented in a case where the petitioner killed both Charisse Christopher and her two year old daughter Lacie

by repeatedly stabbing them with a butcher knife. During this attack, petitioner also repeatedly stabbed Ms. Christopher's three year old son, Nicholas, who apparently witnessed the attack on his mother and sister and survived despite knife wounds that went entirely through his body. *State v. Payne*, 791 S.W.2d 10, 12 (Tenn. 1990).

With that as the backdrop, the Supreme Court now finds itself considering whether it was *prejudicial error of constitutional dimension* for the jury sentencing the perpetrator of this brutal multiple murder to hear the prosecutor comment on the good character of the young mother and her children and the extent of their suffering. Even more alarming, the Court's prior decisions on the use of victim impact evidence also compel it to consider whether it was constitutionally impermissible to allow Nicholas Christopher's grandmother to testify briefly about how her little grandson cries for his dead mother and sister. *See Payne*, 791 S.W.2d at 17-18. These questions are before the Court as constitutional issues only because of the Court's flawed jurisprudence of the Punishments Clause of the Eighth Amendment, culminating in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989).

Booth and *Gathers* are capstones to a series of decisions by this Court without foundation in either the Punishments Clause or any other enduring constitutional principle, and which constitute an unbridled usurpation of legislative power. The Supreme Court of Tennessee expressed its assessment of *Booth* and *Gathers* in blunt but eloquent terms:

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to

relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

State v. Payne, 791 S.W.2d at 19. Yet that is where the tortuous path of this Court's Eighth Amendment jurisprudence has led it.

Such juridical meandering should have been avoided. In his opinion for the Court in *McGautha v. California*, Justice Harlan warned that it would be impossible to solve "the intractable . . . problem of 'standards' which the history of capital punishment has from the beginning reflected." 402 U.S. 183, 207 (1971). In the jurisprudence developed in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), the Court has attempted this impossible task, based in large measure on the erroneous assumption that the Punishments Clause of the Eighth Amendment incorporates "the evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion), quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

If the Court persists in its present approach, it will find itself repeatedly inventing constitutional distinctions, judicially woven into the fabric of the Punishments Clause, between the minutiae of evidentiary and procedural rules presented on review of capital sentencing proceedings. Instead, the Court should belatedly heed its own warning that "[c]aution is necessary lest this Court become, 'under the aegis of the Cruel and Unusual Punishments Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.'" *Gregg*, 428 U.S. at 176 (plurality opinion), quoting *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion).

Alternatively, *Booth* and *Gathers* should be overruled because they were wrongly decided even in the context

of the Court's earlier decisions construing the Punishments Clause. There is no general constitutional objection to a victim's participation in criminal sentencing proceedings. Furthermore, such participation would serve important social purposes emphasized by the Court in its earlier opinions. The full measure of the murderer's responsibility for his crime necessarily includes the real harm caused to the victim and her family, not merely an abstract assessment of *mens rea*. Given the virtually unlimited range of mitigation evidence that may be offered by the defendant, the sentencing jury should also be fully apprised of the human suffering that results from the criminal's murderous act.

ARGUMENT

I. **BOOTH AND GATHERS SHOULD BE OVERRULLED BECAUSE THEY REPRESENT THE APOTHEOSIS OF A FLAWED JURISPRUDENCE OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE.**

A. The Punishments Clause Was Originally Understood Solely As a Prohibition of Torture and Other Barbarous Punishments.

The language of the Punishments Clause originated in the English Bill of Rights of 1689, which provided: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This provision was incorporated verbatim into the Virginia Declaration of Rights by George Mason in 1776, and shortly thereafter found its way into the constitutions of eight other states and the Northwest Ordinance of 1787. With a minor change in wording

("shall not be" instead of "ought not to be"), it was adopted in 1791 as the Eighth Amendment.¹

There has been debate as to the purpose of the language about cruel and unusual punishments in the English Bill of Rights. This language was traditionally thought to have been adopted in response to the harsh punishments meted out by Lord Justice Jeffreys in the "Bloody Assize." Modern scholarship indicates that the language more likely refers to punishments inflicted upon Titus Oates for giving perjured testimony leading to the erroneous execution of a number of supposed participants in the infamous "Popish Plot" of 1678-79.² "In the context of the Oates case, 'cruel and unusual' seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose."³

The debate over the meaning of this language in the English Bill of Rights has become significant because all available evidence indicates that the American framers of the Punishments Clause intended it solely as a prohibition of torture and other barbarous punishments.⁴ Throughout the Nineteenth Century this Court and commentators have treated the Punishments Clause as applying to methods of punishment involving "torture or a lingering death," such as burning at the stake, crucifixion or breaking on the

¹*Furman v. Georgia*, 408 U.S. 238, 319 (Marshall, J., concurring); Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning," 57 Calif. L. Rev. 839, 839-40 (1969).

²*Furman v. Georgia*, 408 U.S. at 317-18 (Marshall, J., concurring); Granucci, *supra* note 1, at 852-59; see R. Berger, *Death Penalties: The Supreme Court's Obstacle Course* 35-40 (1982).

³Granucci, *supra* note 1, at 859.

⁴*Furman v. Georgia*, 408 U.S. at 319-21 (Marshall, J., concurring); Granucci, *supra* note 1, at 840-44. Granucci attributes this American understanding to a misreading of English legal history. *Id.* at 860-65.

wheel.⁵ The clause was not thought to authorize judicial review of the proportionality of a punishment to the offense.

In recent years, the circumstances giving rise to this provision in the English Bill of Rights have been invoked to justify a broader conception of the Punishments Clause than the understanding of the American framers.⁶ This approach is unwarranted for two reasons.

First, the only relevant original meaning is that given the clause by the people who framed and ratified it in 1791. If the English used the words in a different sense in 1689, and that meaning was unknown in America in 1791, then it can hardly bear on the original meaning of the Eighth Amendment. And the authorities are generally in agreement that the American framers understood the clause to prohibit inherently cruel methods of punishment and not those that were disproportionate to the offense.⁷

Second, it exaggerates the history of the English clause to say that it reflects an understanding that a punishment must be proportioned to the severity of the crime. The concern in Titus Oates' case seems to have been that the punishments were unauthorized by statute or custom. At a time when petty theft was a capital offense, it strains credibility to believe that the English thought Oates' punishments disproportionately severe for a perjurer whose testimony had caused fifteen innocent men to be executed. And, in fact, Oates' sentence --

while criticized in some quarters -- was upheld by the House of Lords a few months after the promulgation of the Declaration of Rights.⁸

In any event, America's Bill of Rights, as adopted, clearly contemplated the lawful imposition of capital punishment in the language of the Fifth Amendment,⁹ and the death penalty has been part of federal and state criminal law since the beginning of the Republic. Likewise, the Fourteenth Amendment, ratified in 1868, explicitly refers to the death penalty.¹⁰ Whatever original meaning is attributed to the Punishments Clause, it certainly cannot prohibit the lawful imposition of capital punishment.

B. In this Century, the Court Has Improperly Substituted Ideology for History in its Interpretation of the Punishments Clause.

The historical approach to the Punishments Clause was abandoned when the Court began to apply a theory of progressive societal enlightenment as the basis of its jurisprudence.

In *Weems v. United States*,¹¹ the Court expanded the meaning of the Punishments Clause beyond a limitation on the *methods* of punishment to include a review of the

⁵R. Berger, *supra* note 2, at 37-40.

⁶"No person shall be held to answer for a *capital . . .* crime, unless on a presentment or indictment of a Grand Jury . . .; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of *life . . .* without due process of law . . ." U.S. Const. amend. V (emphasis added).

¹⁰" . . . nor shall any State deprive any person of life . . . without due process of law . . ." U.S. Const. amend. XIV, § 1.

⁸217 U.S. 349 (1910).

⁷*In re Kemmler*, 136 U.S. 436, 446-47 (1890); see *Wilkinson v. Utah*, 99 U.S. 130, 135-36 (1879), and commentators cited therein.

⁶*Solem v. Helm*, 463 U.S. 277, 284-86 (1983); *Rummel v. Estelle*, 445 U.S. 263, 288 (1980); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 318 (1972) (Marshall, J., concurring).

⁸*Granucci*, *supra* note 1, at 843-44; R. Berger, *supra* note 2, at 43-45; see *Solem v. Helm*, 463 U.S. at 313 n.6 (Burger, C.J., dissenting).

proportionality of the punishment to the crime. *Weems* received a sentence of *cadena temporal* for the offense of making a false entry in a government account book.¹² Although the Court indicated that aspects of the sentence were inherently cruel, it also held that the sentence was invalid because it was disproportionately severe.¹³

Justice McKenna's opinion in *Weems* contains a well-known discussion of the doctrine of a living constitution.¹⁴ He concluded that the Punishments Clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378 (citations omitted). The *Harvard Law Review* praised the decision in *Weems* as "a triumph of enlightenment over history."¹⁵

This theory of progressive enlightenment was again invoked in *Trop v. Dulles*,¹⁶ which invalidated denationalization as a statutory sanction for desertion from the

¹²This punishment, imposed in the Territory of the Philippines, included twelve years of "hard and painful labor" in chains, as well as accessory penalties including lifetime surveillance by government authorities. 217 U.S. at 364-66.

¹³217 U.S. at 377. Justice White's dissenting opinion in *Weems*, joined by Justice Holmes, vigorously disputes the notion that the Punishments Clause authorizes courts to review the proportionality of criminal sentences. 217 U.S. at 382. The practical effect of the holding in *Weems* was limited by *Badders v. United States*, 240 U.S. 391 (1916) (Holmes, J.), in which the Court eschewed a role in the case-by-case review of the proportionality of sentences to crimes.

¹⁴"Time works changes, [and] brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." 217 U.S. at 373. See also *id.* at 373-75.

¹⁵Note, *What is Cruel and Unusual Punishment*, 24 Harv. L. Rev. 54 (1910), cited in Granucci, *supra* note 1, at 843.

¹⁶356 U.S. 86 (1958).

armed forces in wartime. Chief Justice Warren's plurality opinion cited *Weems* for the proposition that the Eighth Amendment was not "static" in scope, *id.* at 101, and concluded that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* The decision in *Trop* did not involve the issue of proportionality review, but rather whether denationalization is an inherently unconstitutional method of punishment.¹⁷ The plurality opinion concluded that it was, because it resulted in "the total destruction of the individual's status in organized society." *Id.*

The doctrine that the Punishments Clause encompasses proportionality review, although weak in historical support, has some textual logic. It appears as part of an amendment that bars "excessive bail" and "excessive fines."¹⁸ However, the rationale stated in *Weems* and *Trop* -- that the Punishments Clause must be interpreted to reflect the evolving decency of human society -- is extraconstitutional in origin. It derives from doctrines of

¹⁷The opinion acknowledged that "[s]ince wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime." 356 U.S. at 99. The opinion also stated that the death penalty "cannot be said to violate the constitutional concept of cruelty." *Id.*

¹⁸See *Furman v. Georgia*, 408 U.S. at 403 (Marshall, J., concurring); *O'Neil v. Vermont*, 144 U.S. 323, 340 (Field, J., dissenting) ("The whole inhibition [of the Eighth Amendment] is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.") There is also some historical support for a concept of proportionality in the common law of England, although this concept is not clearly tied to the adoption of the Punishments Clause as part of the Eighth Amendment. See Granucci, *supra*, note 1, at 844-47. But see R. Berger, *supra*, note 2, at 30-35. The opinion of this Court in *Solem v. Helm* justifies proportionality review solely on the basis of historical and textual analysis. 463 U.S. at 284-90.

cultural evolution that were particularly fashionable in the Nineteenth and early Twentieth Centuries.

In an influential book first published in 1920, *The Idea of Progress*, Professor J.B. Bury surveyed the intellectual history of this concept. He defined the idea of Progress as "based on an interpretation of history which regards men as slowly advancing -- *pedetemtim progradientes* -- in a definite and desirable direction, and infers that this progress will continue indefinitely."¹⁹ Through doctrines such as Positivism,²⁰ Marxism and Social Darwinism,²¹ the idea of Progress permeated the political philosophy of the time.

It is not surprising for a Court that embraced Spencer's economic doctrines in such decisions as *Lochner v. New York* also to embrace in *Weems* his doc-

¹⁹J.B. Bury, *The Idea of Progress* 5 (1932 ed.). See also Pineda, "Civilization and Cultural Evolution," 4 Encyclopedia Britannica 657-60 (15th ed. 1982).

²⁰Comte, for example, believed that mankind had progressed through theological and metaphysical periods to a third or Positive period, which will feature "the organization of society by means of scientific sociology." This period will be controlled by "savants who will direct social life not by theological fictions but by the positive truths of science." J.B. Bury, *supra* note 19, at 299-300. Comte is regarded as the "father" of sociology.

²¹Herbert Spencer's *Social Statics* reflects the view that principles of biological evolution apply in the moral sphere as well. Spencer "begins by arguing that the constancy of human nature, so frequently alleged, is a fallacy. For change is the law of all things." He thus concludes that "perfectibility is possible." Next, he argues that "evil is not a permanent necessity. For all evil results from the non-adaptation of the organism to its conditions: this is true of everything that lives. And it is equally true that evil perpetually tends to disappear." J.B. Bury, *supra* note 19, at 337.

trine of moral evolution.²² What is surprising, however, is that a modern Court, having seen the wars and holocausts of our century, could continue to base constitutional doctrine on the supposition that a maturing society will necessarily enjoy "evolving standards of decency."²³

We do not ask the Court to decide whether the doctrines of Comte, Marx and Spencer are right or wrong; our point is that the Framers did not embody such ideological considerations in the Punishments Clause. It is certainly appropriate for legislators to be influenced by ideological considerations. For judges, reliance on extraconstitutional ideologies should be anathema.²⁴ Justice Story expressed his disdain for such judicial manipulation of the Constitution over one hundred and fifty years ago:

²²Justice Holmes, who joined the dissenting opinion in *Weems*, made the well-known remark in his *Lochner* dissent that the Constitution "does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

²³See P. Johnson, *Modern Times: The World From the Twenties to the Eighties* 731 (1983);

Darwin himself always stressed the limits of his discoveries. He discouraged those who sought to build ambitious projections on them. That was why he gave no license to the theories of the 'Social Darwinists,' which terminated in Hitler's holocaust, and why he likewise brushed off Marx's attempts to appropriate Darwinism for his own theories of social determinism, which eventually produced the mass murders of Stalin, Mao Tse-tung and Pol Pot.

²⁴This was the general point of Alexander Bickel's 1969 Oliver Wendell Holmes lectures, published as A. Bickel, *The Supreme Court and the Idea of Progress* (1970).

I have not the ambition . . . of enlarging or narrowing its powers by ingenious subtleties and learned doubts. . . . Upon subjects of government it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common sense of the people; and never was designed for trials of logical skill, or visionary speculation.²⁵

Nonetheless, our opposition to the visionary "evolving standards of decency" jurisprudence does not mean that the Court should ignore changing circumstances. Although some authorities have advocated a strictly historical approach to this clause,²⁶ technological changes may render methods of punishment "cruel and unusual" today

²⁵J. Story, *Commentaries on the Constitution of the United States* vi (Carolina Academic Press ed. 1987).

The Court's carefully crafted historical jurisprudence of the Excessive Fines Clause of the Eighth Amendment set forth in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), stands in ironic juxtaposition to its ideological jurisprudence of the Punishments Clause. In holding that the Excessive Fines Clause does not apply to punitive damage awards in civil cases, the Court emphasized that "[t]o hold otherwise, we believe, would be to ignore the purposes and concerns of the Amendment, as illuminated by its history." 109 S. Ct. at 2914 (emphasis added).

²⁶See *McGautha v. California*, 402 U.S. 183, 225 (1971) (Black, J., concurring) ("As an original proposition, it is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment . . . was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights."). Justice Holmes also supported that view, joining Justice White's dissent in *Weems v. United States*, 217 U.S. 349, 409-11, 413 (1910).

that were not so in 1791.²⁷ However, this would not be because the old values in the Constitution have evolved into new and better values, but because the same unchanging values are applied in a different factual situation.

C. Disregarding Justice Harlan's Warning in *McGautha*, the Court Has Used the Clause to Erect an Illegitimate Edifice of Constitutional Doctrine for Regulating Capital Punishment.

Just over a year before its *Furman* decision, the Court decided whether a jury could constitutionally impose the death penalty in a murder case without governing standards to guide its exercise of discretion. *McGautha v. California*, 402 U.S. 183 (1971). Justice Harlan, writing for the Court, emphasized the constitutional principles that should guide the exercise of judicial power in review of such cases:

Our function is not to impose on the States, ex cathedra, what might seem to us a better system for dealing with capital cases. . . . [T]he Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this

²⁷For example, the availability of lethal injections might make execution by hanging a cruel and unusual method of punishment in today's society. Opponents of capital punishment have taken varying positions regarding lethal injection. See G. Smith, *Capital Punishment 1986: Last Lines of Defense* 28-33 (1986). Cf. *Heckler v. Chaney*, 470 U.S. 821 (1985) (rejecting argument that Food & Drug Administration should be compelled to ensure that drugs used for execution by lethal injection are "safe and effective").

Court. The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected.

Id. at 195, 221 (citations omitted).

Thirteen months later this sound constitutional approach to capital sentencing procedure was cast aside for an Eighth Amendment analysis that confused courts and legislatures and led to continued misapplication of the Eighth Amendment in subsequent cases.

The majority's *per curiam* decision in *Furman* held that the imposition of the death penalty constituted cruel and unusual punishment in violation of the Eighth Amendment, as applied to the states through the Fourteenth Amendment. 408 U.S. at 239. Each of the five separate concurring opinions arrived at the same result by different routes.

Within four years of the *Furman* decision, at least thirty-five states had reacted by enacting new death penalty statutes. In upholding a new Georgia statute in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court acknowledged that the "standards of decency" argument asserted in *Furman* had been substantially undercut by this flurry of legislative activity. *Id.* at 179 (plurality opinion). But, having concluded that the death penalty was not unconstitutional *per se*, *id.* at 187 (plurality opinion), the Court persisted in using the Eighth Amendment to prescribe in great detail the procedures to be followed in capital punishment cases.

In two lines of cases decided after *Furman*, the Court has undermined the concern expressed in some of the concurring opinions about the excessive discretion that characterized the death penalty statutes that were declared unconstitutional. The effect of these cases is to give a

jury the unbridled discretion to withhold imposition of the death penalty in any case.²⁸

One of these lines of cases precludes the states from defining any category of crime, no matter how serious, for which the death penalty is mandatory. The Court began by holding that a mandatory death penalty for first-degree murder was a cruel and unusual punishment because it violated "contemporary standards regarding the infliction of punishment." *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (plurality opinion); *accord*, *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). The Court continued by holding unconstitutional a statute imposing a mandatory death penalty for the first-degree murder of a police officer engaged in the performance of his duty. *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (*per curiam*). Finally, the Court held that a mandatory death penalty could not be imposed for first-degree murder committed by an inmate serving a life term sentence. *Sumner v. Shuman*, 483 U.S. 66 (1987).²⁹

The other line of cases requires state courts to permit jurors unlimited discretion to consider mitigating circum-

²⁸This approach has been aptly characterized as constituting an "about-face since *Furman*," which has the Court going "from pillar to post" in search of theories to invalidate the imposition of capital punishment. *Lockett v. Ohio*, 438 U.S. 586, 622 (White, J., concurring and dissenting in part, and concurring in the judgment); *id.* at 629 (Rehnquist, J., dissenting).

²⁹More recently, in *Blystone v. Pennsylvania*, 110 S. Ct. 1078 (1990), the Court upheld a capital sentencing procedure that required imposition of the death sentence if the jury found at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously found one or more aggravating circumstances which outweighed any mitigating circumstances. This was not "impermissibly 'mandatory' as that term was understood in *Woodson* or *Roberts*," since "[d]eath is not automatically imposed upon conviction for certain types of murder." 110 S. Ct. at 1082. The Court noted that petitioner Blystone's reliance on *Sumner v. Shuman* was "misplaced." *Id.* at 1083 n.5.

stances at the sentencing phase. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the plurality opinion condemned any limitations on the defendant's proffer of matters in extenuation or mitigation. The Court indicated that its ruling did not limit "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 604 n.12. However, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court retreated from this indication that mitigating evidence could be scrutinized for relevance.³⁰ In like manner, the Court also condemned a capital sentencing procedure that allowed the jury to consider only those mitigating factors it found unanimously when weighing them against the aggravating factors justifying the death penalty. *McKoy v. North Carolina*, 110 S. Ct. 1227 (1990). The Court concluded that this unanimity requirement impermissibly limited jurors' consideration of mitigating circumstances, irrespective of the fact that the jury was not required to impose a death sentence even if it unanimously found aggravating factors and no mitigating factors. *Id.*

These two related lines of cases are squarely based upon the "evolving standards of decency" approach to the Punishments Clause.³¹ Under this approach, the Court has held that the penological theory of discretionary sentencing represents the enlightened view of society and thus is constitutionally mandated in capital cases.

³⁰There, the Court vacated a death sentence because the trial court, apparently on grounds of relevance, refused to consider certain evidence presented by the defendant. This included testimony that he had been raised without proper guidance, that his mother had been an alcoholic and possibly a prostitute, that he had been subject to physical punishment as a child, and that he was emotionally disturbed. 455 U.S. at 107.

³¹In *Woodson*, for example, the plurality opinion repeatedly cites to the plurality opinion in *Trop v. Dulles*. 428 U.S. at 288, 301, 304.

In *Woodson*, the plurality opinion explained this rationale as follows:

Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment [requires this approach].

428 U.S. at 304 (citations omitted).³²

The same rationale is also found in the *Lockett* plurality opinion, which observes at one point: "Most would agree that 'the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process.'" 438 U.S. at 603, quoting *Furman v. Georgia*, 408 U.S. at 402 (Burger, C.J., dissenting). The opinion recognizes that the prevalent "public policy" of sentencing discretion is the product of legislative choice rather than constitutional mandate. However, the opinion concludes that the same "considerations that account for the wide acceptance of individualization of sentences in noncapital cases" justify requiring it as a matter of *constitutional* law in capital cases. 438 U.S. at 605. This is yet another transparent attempt to cloak the usurpation of legislative prerogatives in the garb of constitutional principle. "Description, even approval, of the prevailing mood of penal philosophy . . .

³²In *Roberts (Stanislaus)*, the plurality opinion elaborated on this rationale by adverting to "our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'" 428 U.S. at 333, quoting *Williams v. New York*, 337 U.S. 241, 247 (1949).

is one thing; its elevation to constitutional dogma is quite another."³³

The opinions of the Court in later cases such as *Roberts (Harry)*, *Sumner v. Shuman*, *Eddings*, and *McKoy* simply adopt without much elaboration the rationale of the plurality opinions in *Woodson* and *Lockett*.

We have already explained why the progressive enlightenment theory of *Weems* and *Trop* is an illegitimate basis for interpreting the Punishments Clause. It is important to recognize that in *Woodson*, *Lockett* and their progeny the Court went well beyond the holding of *Weems* regarding proportional punishment. Today, we are told that enlightened social theory requires punishment to be proportional, not to the *crime*, but to the *criminal*.

Moreover, if the meaning of the Eighth Amendment reflects changes in social theory, then the rationale of *Woodson* and *Lockett* is simply out of date. The evolution of sentencing theory and practice now strongly supports mandatory sentencing as the more enlightened policy.³⁴ Thus, even if one applies this evolutionary approach to the Eighth Amendment, it provides no

³³Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1078 n.21 (1964).

³⁴See S. Kadish & S. Schulhofer, *Criminal Law and its Processes* 131-36 (5th ed. 1989) (materials on the determinate sentence reform movement); K. Starr, "The Impetus for Sentencing Reform in the Criminal Justice System," in *Crime and Punishment in Modern America* 299-312 (P. McGuigan & J. Pascale, eds., 1986); Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938, 1940-44 (1988); Lowe, *Modern Sentencing Reform: A Preliminary Analysis of the Proposed Federal Sentencing Guidelines*, 25 Am. Crim. L. Rev. 1 (1987). Congress adopted the policy of mandatory sentencing guidelines for all federal courts in the Sentencing Reform Act, part of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, 98 Stat. 1837 (1984).

support for invalidating a mandatory death penalty for first-degree murder.

In reality, the Court's invocation of social theory in support of constitutional adjudication is jurisprudential sophistry. A slender majority of the Court has laid a procedural minefield to cripple federal and state efforts in carrying out the mandate of the electorate that certain heinous crimes, like the premeditated murder of a police officer engaged in the performance of duty, should be punished by death.

D. The Court's Illegitimate Jurisprudence of the Punishments Clause Has Culminated in the Holdings of *Booth* and *Gathers* that Victim Impact Evidence Cannot Be Considered In Capital Sentencing.

In *Booth v. Maryland*, the Court applied its Punishments Clause jurisprudence to the use of a victim impact statement in the sentencing phase of a capital trial. The Court held it was unconstitutional for the jury to consider information about the character of the victim, the impact of the crime on the victim's family, and their sentiments about the crime. 482 U.S. at 503-09. The Court went further in *South Carolina v. Gathers*, condemning prosecutorial comment on evidence relating solely to the character of the victim even though that evidence had already been admitted in the guilt phase of the trial without defense objection. 490 U.S. at 811-12. The majority opinion in *Gathers* would prevent the jury from catching even a "glimpse of the life" the murderer "chose to extinguish." *Id.* at 816 (O'Connor, J., dissenting, quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

We will argue in part II infra that *Booth* and *Gathers* are incorrect for reasons unrelated to our criticisms of the Court's recent jurisprudence of the Punishments Clause.

First, however, we examine how *Booth* and *Gathers* are the products of that flawed jurisprudence.

Of course, both decisions continue the Court's effort to build a set of procedural requirements for the death penalty under the Punishments Clause that is entirely separate from any analysis under the Due Process Clause as in *McGautha*. Indeed, the Court in *Booth* carefully stated that its opinion carried no implication concerning the use of victim impact evidence in non-capital cases. 482 U.S. at 509 n.12.

Booth and *Gathers* are also rooted in the view that evolving standards of decency require capital punishment to reflect an "individualized determination" based upon each defendant's unique situation. *Booth* at 502, quoting *Zant v. Stephens*, 462 U.S. at 879; accord *Gathers* at 810: "For purposes of imposing the death penalty . . . [the defendant's] punishment must be tailored to his personal responsibility and moral guilt," quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982). This, of course, reflects the once-fashionable theory that rejected mandatory sentencing for a discretionary and individualized approach.

At bottom, however, *Booth* and *Gathers* reflect a view that evolving standards of decency require a utilitarian approach to punishment. This is not expressly stated in the opinions, but becomes clear upon examining their antecedents and effects.

A basic value of victim impact evidence is to satisfy the need of the victim (including in a murder case the victim's family) to seek retribution for a grievous loss. A sentencing procedure that permits victims to have input into the sentencing process obviously satisfies this purpose more effectively than one in which their voices are excluded. *Booth* and *Gathers* treat such input from or about victims as irrelevant to any proper sentencing considerations. *Gathers*, 490 U.S. at 811-12; *Booth*, 482 U.S. at 504.

Why is the victim's desire for retribution irrelevant? Some members of the Court have indicated that evolving standards of decency have brought us to a point where retribution is no longer a proper goal of criminal punishment. Justice Marshall's concurring opinion in *Furman* states in part:

Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.

408 U.S. at 343 (citations and footnote omitted). See also *id.* at 387 (Brennan, J., concurring).

Here, again, one wonders what constitutional source justifies the rejection of a retributionist theory of punishment for a utilitarian approach. In fact, both retributionist and utilitarian theories of punishment were known at the time the Eighth Amendment was adopted.³⁵ Since then, the relative popularity of the theories has varied from time to time.³⁶ In his lecture on the criminal law first published in 1881, Oliver Wendell Holmes observed:

It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance

The statement may be made stronger still, and it may be said, not only that the law does, but that it ought to, make the gratification of revenge an object. This is the opinion, at any rate, of two authorities so great, and so opposed in their other views, as Bishop

³⁵See Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 845-53 (1972).

³⁶See W. Berns, *For Capital Punishment* 41-82, 128-52 (1979) (discussing the rise and fall of rehabilitative, deterrent and retributionist theories of punishment since the Eighteenth Century).

Butler and Jeremy Bentham. Sir James Stephen says, "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."³⁷

Holmes went on to indicate that the criminal justice system could appropriately reflect in various ways all of the theories of punishment. Our point in presenting this discussion is that we have no reason to assume that the Framers meant to incorporate one theory rather than the other into the Punishments Clause. It follows that nothing in the Constitution legitimizes the Court's imposition of one theory or the other on the American electorate.

However, if a "living Constitution" embodies the latest trend in evolving social theory, then the Court's current insistence upon a utilitarian approach to punishment is already out of date. In recent years, there has been a great change in penological thought. The utilitarian theories have been at least partially discredited, and the retributionist theory is now quite popular. One commentator has summarized this trend as follows:

In the modern era, judicial sentencing philosophy had changed radically; rather than requiring that the punishment fit the crime, judges adopted the view that the punishment should fit the offender. During the 1950's, the predominant judicial philosophy of punishment, as well as the prevailing view of penologists favored the concepts of deterrence and rehabilitation over the concepts of retribution and incapacitation. More recently, however, the emphasis has shifted again; both judges and penologists have expressed considerable skepticism about the value of rehabilitation. Support is growing in the courts and

³⁷O.W. Holmes, *The Common Law* 40, 41 (1923 ed.).

Congress for a crime control model of punishment based primarily upon retribution and incapacitation.³⁸

A court whose jurisprudence of the Punishments Clause requires it to reflect "evolving standards of decency" cannot today claim that considerations of retribution must be excluded from the capital sentencing process. Consequently, the Court's vision of a protean Eighth Amendment has already rendered its judgments in *Booth* and *Gathers* obsolete.

II. ALTERNATIVELY, *BOOTH* AND *GATHERS* SHOULD BE OVERRULED BECAUSE THEY ARE ERRONEOUS EVEN IN THE CONTEXT OF THE COURT'S OTHER DECISIONS UNDER THE PUNISHMENTS CLAUSE.

A. There is No General Constitutional Impediment to According a Victim Standing to Participate in the Criminal Process, Including Sentencing.

It is a legal fiction of comparatively recent origin that only the state has an interest in the prosecution of crimes. In England prior to the Nineteenth Century, criminal prosecution was primarily the responsibility of the victim. Public prosecutors were actually more common in the colonies at the time of the American Revolution. Still, private prosecution was accepted in the United States at the time the Eighth Amendment was

³⁸Ogletree, *supra* note 34, at 1940-41 (footnotes omitted). See also W. LaFave & A. Scott, *Criminal Law* 26-29 (2d ed. 1986); Gardner, *The Renaissance of Retribution -- An Examination of Doing Justice*, 1976 Wis. L. Rev. 781 (1976).

adopted and for some years thereafter.³⁹ In light of this history, it would be hard to say that the Framers thought that victim participation in criminal prosecution raised a constitutional doubt. Nor can it be said that the move to public prosecution reflected a desire to eliminate any role for the victim.⁴⁰

Even today, private prosecution of crimes is permitted in a number of states. Although the propriety of allowing a victim to control the prosecution of a crime has been called into question, the point is a debatable one.⁴¹ The existence of a close debate on victim control of prosecution suggests that more limited victim participation in the nature of an impact statement should not be constitutionally questionable.⁴²

³⁹See Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 Pepperdine L. Rev. 117, 125-32 (1984); Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J.L. & Pub. Pol'y 357, 359-72 (1986); Benson, *The Last Victim and Other Failures of the Public Law Experiment*, 9 Harv. J.L. & Pub. Pol'y 399, 400-12 (1986).

⁴⁰Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 Law & Contemp. Probs. 225, 245 (1984).

⁴¹Compare Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U.L. Rev. 754 (1976), with Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 Yale L.J. 209 (1955). See also Gittler, *supra* note 48, at 150-63; Cardenas, *supra* note 39, at 372-84.

⁴²Decisions denying interested parties a role in criminal proceedings reflect descriptive, rather than normative, conclusions. For example, private parties, including victims, have been denied standing to compel enforcement of criminal statutes, but the lack of standing is generally related to the absence of any statute conferring a right to sue. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 Yale L.J. 488 (1988). See Also Linda R. S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) (although standing to
(continued...)

Recent years have seen a dramatic trend toward greater formal involvement of victims in the criminal process. The Court's approach to victim participation in capital sentencing has, in the past, ignored society's desire to consider the suffering caused by the act of murder when determining an appropriate punishment. This is true even though the Court repeatedly has held that the decision of the capital sentencer is a moral one, reflecting the moral judgment of the community. *California v. Brown*, 479 U.S. 538, 545 (1987).

The moral judgment of the public is manifested in the laws enacted by its elected officials. Statutes are "first among the objective indicia" of public attitude. *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 2975 (1989). Imposing the death penalty, after taking into account the impact of the killer's act on the victim and the victim's family, is prohibited under the Eighth Amendment as cruel and unusual only if society has "set its face against" consideration of the victim at sentencing. *Id.*, at 2979. In fact, the reverse is true, the national consensus, as reflected in the operative acts of the public, supports the sentencer's consideration of the injury to the victim. There is no rational or constitutional basis to eliminate the moral judgment of the community from the sentencing phase of a capital offender's trial.

The Court owes deference to the decisions of the state legislatures under our federal system. *Gregg*, 428 U.S., at 176. "Determinations of appropriate sentencing considerations are peculiarly questions of legislative policy." *Booth*, 482 U.S., at 515 (White, J., dissenting). Currently, forty-seven states legislatively authorize input

^a(...continued)

challenge nonprosecution was denied for lack of actual or threatened injury, "Congress may enact statutes creating legal rights, the invasion of which creates standing") But see *Young v. U.S. ex rel Vuitton et Fils*, 107 S. Ct. 2124, 2141 (1987) (Blackmun, J., concurring).

by the victim at sentencing.⁴³ In a survey of states, 63 percent were found to require victim impact information on the seriousness of the physical injury. Fifty-three percent require information on emotional or psychological injury. In 25 percent of the states, the victim is asked to tell the court his or her opinion about the offender, while 72 percent permit such an opinion but do not require it. Finally, in 26 percent of the states, the victim is asked to specify a sentence recommendation.⁴⁴ Under *Booth*, all of this legislation is invalid in capital cases.

B. Victim Participation Serves Important Social Purposes.

We have previously presented our view that the Constitution does not require all criminal punishments to be justified on utilitarian grounds. *See supra* part I.D. However, from a purely utilitarian perspective, victim participation in the criminal process serves a number of important purposes. This analysis supports our view that *Booth* and *Gathers* were wrong in excluding victim impact evidence in capital cases.

1. Victim Involvement in the System Discourages Vigilantism.

Justice Stewart's concurring opinion in *Furman* contains the following observation: "When people begin to believe that organized society is unwilling or unable to

⁴³A listing of these statutes is included in the Appendix to this brief.

⁴⁴McLeod, *An Examination of the Victim's Role at Sentencing: Results of a Survey of Probation Administrators*, 71 JUDICATURE 162 (1987); ABA Guidelines to Fair Treatment of Victims and Witnesses in the Criminal Justice System 18 (1983); Note, *VIS: Reform or Reprisal*, 27 Am. Crim. L. Rev. 391 (1989).

impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy -- of self-help, vigilante justice, and lynch law." 408 U.S., at 308. These concerns are not fanciful.

The victim's rights movement has gained strength in recent years, indicating widespread unrest among victims with the current criminal justice process.⁴⁵ The public often allies itself with citizens who "take the law into their own hands" in response to the inability of the criminal justice system to recognize society's rights and needs.⁴⁶ All of these facts indicate that society is perhaps reaching the point at which the concept of justice held by the individual, and by the general public, is no longer satisfied by the law.

2. A Right of Victim Participation Encourages Cooperation with Police and Prosecutors.

When victims of crime perceive that the criminal justice system is not vindicating their interests, support for the criminal justice system, which is crucial to the apprehension and conviction of criminals, declines. "Indeed, the conclusion has become nearly inescapable: a criminal justice system that ignores the interests of or ill

⁴⁵Both on the national and local levels, organizations have sprung up across the country to address issues of concern to crime victims and to promote the rights of victims. *See Carrington and Nicholson, The Victims' Movement: An Idea Whose Time Has Come*, 11 Pepperdine L. Rev. 1 (1984); National Organization for Victims' Assistance, *Victims' Rights and Service: A Legislative Directory* (1987).

⁴⁶The case of Bernard Goetz is instructive. Goetz initially received much public support for his actions. *See N.Y. Times*. Jan. 27, 1985, Sec. 4, at 20, col. 1 (discussing reasons for public support of Goetz).

treats the victim runs the risk of alienating the person upon whom its success as an institution depends."⁴⁷

Crime victims are the major initiators of the criminal process. Approximately eighty percent of crimes are made known to the police through reports of citizens, usually victims.⁴⁸ Yet, various statistics indicate that many crimes go unreported.⁴⁹ Among the reasons why victims opt not to report crimes is the fear that the system is powerless to help them and might further victimize them.⁵⁰ Similarly, crime victims often choose not to cooperate with prosecution of the offender, leading to dismissal of many cases.⁵¹ Non-cooperation is caused by both the administrative problem of lack of information, and by the systemic flaw of failing to take victims' views and interests into account.⁵²

⁴⁷Hudson, *The Crime Victim and The Criminal Justice System: Time for a Change*, 11 Pepperdine L. Rev. 23, 28 (1984).

⁴⁸Gittler, *supra* note 39, at 147.

⁴⁹Judge Mikva has noted that for every ten crimes committed, an estimated three or four are reported. This figure indicates a "pervading cynicism about the system's capacity to insure justice." Mikva, *Victimless Justice*, 71 J. Crim. L. & Criminology 189, 190 (1981). The Bureau of Justice Statistics, *U.S. Dep't of Justice Report to the Nation on Crime and Justice* (2d. ed., 1988), suggests that less than 50% of all violent crimes are ever reported.

⁵⁰Kidd & Cajet, *Why Victims Fail to Report? The Psychology of Criminal Victimization*, 40 J. Soc. Issues 34-50 (1984), cited in Kilpatrick & Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 21 (1987).

⁵¹Gittler, *supra* note 39, at 148. See also Hudson, *supra* note 47, at 30.

⁵²See Kelly *Victims' Perceptions of Criminal Justice*, 11 Pepperdine L. Rev. 15 (1984).

Since victims of crime have already suffered, physically and psychologically, it is not surprising that they choose to avoid involvement in the criminal process. Studies addressing victim involvement in the criminal process suggest that there is a high correlation between victims' satisfaction and their perceptions that they influenced the outcome or that the sentencing authority was sensitive to victim issues.⁵³ These studies confirm that a greater role for victims in the sentencing process may positively impact on the reporting and investigation of crime.

3. *Participation in the Criminal Justice System Helps to Remedy the Traumatic Effects of Crime on the Victim.*

Victimization carries with it profound psychological consequences, both immediate and long term, and it is often this psychological injury that has the greatest impact on the victim.⁵⁴ In addition to crime-related stress caused by feelings of inequity, loss of security, perceived greater vulnerability, and perception of being deviant, crime victims are psychologically affected by the lack of any role in the criminal process. The victim quickly learns that the system's resources "are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands."⁵⁵ This realization, combined with the long duration of the capital criminal process, results in a feeling of loss of identity

⁵³Kilpatrick & Otto, *supra* note 50, at 23-24 (citing J. Herndon & B. Forst, *The Criminal Justice Response to Victim Harm* (1984)).

⁵⁴Task Force on the Victims of Crime and Violence, *Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 Am. Psych. 107 (1985).

⁵⁵*Id.* at 109.

and additional emotional and psychological stress for the victim.⁵⁶ Permitting crime victims to participate in the proceedings can eliminate or reduce the potential for further psychological harm by reducing their perception of inequity or helplessness.⁵⁷ In particular, participation at the sentencing phase can be a cathartic experience for the victim, which helps bring an end to the psychological suffering that follows victimization.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Tennessee should be affirmed, and this Court's decisions in *Booth* and *Gathers* should be overruled.

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar
Richard A. Samp
Washington Legal
Foundation
1705 N. Street, N.W.
Washington, D.C.
20036
(202)857-0240

Richard K. Willard*
George A.B. Peirce
John M. Shoreman
Steptoe & Johnson
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

*Counsel of Record

⁵⁶*Id.*; Gibbons, *Victim Again: Survivors Suffer Through Capital Appeals*, 74 A.B.A.J. 64 (Sept. 1988).

⁵⁷Kilpatrick and Otto, *supra* note 50, at 19.

APPENDIX

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 125,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of its resources to promoting victims' rights and criminal justice reform. In 1981, WLF published a "Crime Victims Impact Statement" manual to serve as a model guide for implementation at the state level of the use of victim impact information. WLF works with other victim rights groups, including the *amici* in this case. WLF has appeared before this court as *amicus curiae* in a number of cases dealing with victim rights issues, including *South Carolina v. Gathers*, 490 U.S. 805 (1989), and *Ohio v. Huertas*, cert. dismissed as improvidently granted, 111 S. Ct. 805 (1991). WLF argued in *Gathers* and *Huertas*, as it does in this brief, that the Court should overrule *Booth v. Maryland*, 483 U.S. 496 (1987).

Families & Friends of Missing Persons & Violent Crime Victims is a nonprofit organization providing assistance, support, and information to the thousands of victims each year throughout the State of Washington. The organization was formed in 1975 following the tragic disappearances and deaths of several Seattle area girls. Families & Friends works with victims, the community, law enforcement officials, correction and criminal justice personnel, and the media to promote understanding of the physical and emotional trauma of victimization.

The National Victim Center (formerly The Sunny von Bulow National Victim Advocacy Center) is a national, nonprofit organization based in Fort Worth, Texas. The Center's purposes are to promote responsiveness of the criminal justice system to the rights and needs of the victims of violent crime, as well as to increase public

awareness concerning the plight of crime victims through educational programs, conferences, and publications.

Parents of Murdered Children (POMC), founded by the parents of Lisa Hullinger, who was murdered in 1978, is a national nonprofit, self-help support organization based in Cincinnati, Ohio with chapters nationwide. Besides providing support for grieving parents and family members, POMC provides information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family. POMC has appeared, along with WLF, as an *amicus* in several cases, including *South Carolina v. Gathers, supra*, and *Ohio v. Huertas, supra*.

People Against Child Abuse, Inc. (PACA) is the Maryland chapter of the National Committee for the Prevention of Child Abuse. Founded in 1984, PACA has 40,000 members and supporters statewide. PACA conducts educational programs for both adults and children and provides legal and material help to victims of child abuse. PACA recently appeared before this Court as an *amicus* in *Maryland v. Craig*, 110 S. Ct. 3157 (1990).

The Stephanie Roper Committee, Inc. is a nonprofit organization based in Upper Marlboro, Maryland, which was founded in 1982 by Roberta Roper, the mother of Stephanie, who was brutally kidnapped, raped, tortured, and murdered. The Committee is a victim rights advocacy organization which has proposed legislation responsive to the needs of victims. One such proposal enacted into law was the Victim Impact Statement Law, which was the subject of the challenge in *Booth v. Maryland, supra*, in which the Committee also appeared as an *amicus*.

VICTIM IMPACT LEGISLATION

- Alaska-Alaska Stat. 12.55.022 (1990)
- Arizona-A.R.S. 13-702F (1989)
- Arkansas-Ark. Stat. Ann. 5-65-109 (1987)
- Colorado-C.R.S. 16-11-102 (1991)
- Delaware-11 Del. C. 4331 (1990 Supp.)
- Florida-Flo. Stat. 921.143 (1985)
- California-Penal Code § 1191.1 (1991 Supp.)
- Georgia-O.C.G.A. 17-10-1.1 (1990)
- Idaho-Id. Code 19-5306 (Supp. 1990)
- Illinois-Ill. Rev. Stat. 38-1406 (1990 Supp.)
- Indiana-Ind. Code Ann. 35-38-1-8.5 (1990)
- Iowa-Iowa Code 910A.5 (1989)
- Kansas-K.S.A. 8-1019 (1990 Supp.)
- Kentucky-Rev. Stat. Am. Title XXXVIII 421.520 (Supp. 1990)
- Massachusetts-Mass. Ann. Laws ch. 279, 4B (Supp. 1988)
- Louisiana-R.S. 46:1844(a) (Supp. 1990)
- Maryland-Md. Ann. Code. 27, 761 (Supp. 1990)
- Michigan-Mich. C.L. 780.763 (Supp. 1990)
- Mississippi-Miss. Code Ann. 99-19-151 to 161 (1990)
- Missouri-R.S. Mo. 595.203 (1989)
- Montana-Mont. Code Anno. 46-18-112 (1989)
- Minnesota-Minn. Stat. 611A.037 (Supp. 1991)
- Maine-Me. Rev. Stat. 17A-1257(2) (Supp. 1990)
- Nebraska-Rev. Stat. of Neb. 29-2261 (1989)
- Nevada-Nev. Rev. Stat. Ann. 176.015 (Supp. 1989)
- New Jersey-N.J.S.A. § 2(c):44-6.B (Supp. 1990)
- New Mexico-N.M. Stat. Ann. 31-24-5 (1990)
- New York-N.Y.C.L.S. Crim. Pro. Law 390.30(3B) (Supp. 1991)
- New Hampshire-N.H. Rev. Stat. Ann. 651:4-A (Supp. 1989)
- North Carolina-N.C. Gen. Stat. 15A-825 (1990)
- North Dakota-N.D. Cent. Code ch. 12.1-34-02.14 (Supp. 1989)

Ohio-O.R.C. Ann. 2947.051 (1991)
Oklahoma-Ok. Stat. Ann. Tit. 22 § 982 (1986)
Oregon-O.R.S. 144.790(3) (1989)
Pennsylvania-Penn. Cons. Stat. Ann. Title 71 § 180-9.3
(1990)
Rhode Island-R.I. Gen. Laws 12-28-3, 12-28-4-4.3 (1989)
South Carolina-S.C. Code Ann. 16-3-1550 (Supp. 1990)
South Dakota-S.D. Cod. Laws 23A-27-1.1 (1990)
Tennessee-Tenn. Code Ann. 40-38-103(2)(1990)
Texas-Code Crim. Pro. 56.03 (Supp. 1991)
Utah-Utah Code Ann. 64-13-20(e) (1990)
Virginia-Va. Code Ann. 19.2-299.1 (1990)
Vermont-Stat. Ann. title 13 § 7006(a) (Supp. 1990)
Washington-Rev. Code 7.69.030(12) (Supp. 1991)
West Virginia-Code 61-11A-3 (1989)
Wisconsin-Stat. Ann. § 950.04(2M) (Supp. 1990)
Wyoming-Wyo. Stat. 7-21-103 (1990)

APR 8 1991

In The

Supreme Court of the United States
October Term, 1990

States of THE CLERK

PERVIS TYRONE PAYNE,

v.

*Petitioner,***TENNESSEE,***Respondent.***On Writ Of Certiorari To The Supreme
Court Of Tennessee**

BRIEF OF AMICI CURIAE JUSTICE FOR ALL
POLITICAL COMMITTEE, THE CONNECTICUT
LEAGUE OF VICTIMS INC., EASTERN
CONNECTICUT HOMICIDE SURVIVORS,
SURVIVORS OF HOMICIDE, INC., STAMFORD
SURVIVORS OF HOMICIDE, PARENTS OF
MURDERED CHILDREN OF NEW YORK STATE,
INC., LONG ISLAND CHAPTER OF PARENTS OF
MURDERED CHILDREN AND OTHER SURVIVORS
OF HOMICIDE VICTIMS, ALBANY (CAPITOL
DISTRICT) CHAPTER OF PARENTS OF MURDERED
CHILDREN AND OTHER SURVIVORS OF
HOMICIDE VICTIMS, SIBLING SUPPORT AND
ACTION GROUP, HOMICIDE CRISIS OUTREACH
PROGRAM, AND THE STEPHANIE ROPER
COMMITTEE, INC., IN SUPPORT OF RESPONDENT

SALLY S. KING
ROBINSON & COLE
One Commercial Plaza
Hartford, CT 06103-3597
(203) 275-8200
Counsel of Record

RAYMOND T. DEMEO
ROBINSON & COLE
One Commercial Plaza
Hartford, CT 06103-3597

MARIO THOMAS GABOURY
P.O. Box 1780
Bridgeport, CT 06604

PAUL G. GARLAND
130 Old Church Road
Greenwich, CT 06830

Attorneys for Amici Curiae

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Amendment to the United States Constitution prohibits any form of victim impact evidence to be considered at a capital sentencing hearing?
2. Whether the court should overrule its decision in *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 109 S. Ct. 2207 (1989) and permit a capital sentencing body to consider some forms of victim impact evidence in reaching its determination?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Authorities	iii
Identity and Interests of <i>Amici Curiae</i>	1
Introduction and Summary of Argument.....	3
ARGUMENT	5
I. Contrary to the Majority Holdings in <i>Booth v. Maryland</i> and <i>Gathers v. South Carolina</i> , Consideration of Victim Impact Evidence at a Capital Sentencing Hearing, With Proper Constraints, Does Not Taint the Fairness of the Proceeding	5
II. The Majority Opinions in <i>Booth</i> and <i>Gathers</i> Lack Constitutional Foundation and Usurp the Policy-Making Functions of the Legislature.....	8
III. Consistent with this Court's Eighth Amendment Jurisprudence, A Criminal Defendant at Capital Sentencing Should be Held Accountable for All of the Circumstances of his Offense, Including Its Impact on Victims.....	10
IV. The Test of "Blameworthiness" Set Forth in <i>Booth</i> and <i>Gathers</i> Is Ambiguous, And Its Application Impairs the Values of Certainty and Predictability In Capital Sentencing.....	13
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
<i>Booth v. Maryland</i> , 107 S.Ct. 2529 (1987)	<i>passim</i>
<i>California v. Brown</i> , 107 S.Ct. 837 (1987)	7, 8
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982).....	8, 11
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982).....	11
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....	9, 13
<i>Gathers v. South Carolina</i> , 109 S.Ct. 2207 (1989) ..	<i>passim</i>
<i>Gore v. United States</i> , 357 U.S. 386 (1958).....	9
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	6, 9, 10
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978).....	6, 11
<i>Mills v. Maryland</i> , 108 S.Ct. 1860 (1987)	6, 8
<i>Morris v. Slappy</i> , 461 U.S. 1 (1983).....	9
<i>Pennsylvania v. Ashe</i> , 302 U.S. 51 (1937)	11
<i>State v. Payne</i> , 791 S.W.2d 10 (1990)	3
<i>Witherspoon v. Illinois</i> , 391 U.S. 510 (1968)	5, 10
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976).....	6, 7
<i>Zant v. Stephens</i> , 462 U.S. 862 (1982)	11

In The
Supreme Court of the United States

October Term, 1990

PERVIS TYRONE PAYNE,

Petitioner,

v.

TENNESSEE,

Respondent.

On Writ Of Certiorari To The Supreme
Court Of Tennessee

BRIEF OF AMICI CURIAE

IDENTITY AND INTERESTS OF AMICI CURIAE

Justice for All Political Committee is a Connecticut political action committee which advocates legislative change to increase victim participation in the criminal justice system. Its chairman, Paul Griffith Garland, is the father of a murdered daughter. He also is the chairman of the Crime Victims' Rights Committee of the Connecticut Bar Association.

The Connecticut League of Victims Inc. is a non-profit corporation whose activities include the operation of a homicide survivors group whose meetings are held

in Bridgeport, Connecticut. Its president, David Kniffin, is the father of a murdered son.

Eastern Connecticut Homicide Survivors is a unincorporated association of homicide survivors, whose meetings are held in Norwich, Connecticut. Its president, Greg Vickers, is the father of a murdered daughter.

Survivors of Homicide, Inc. is a not for profit corporation whose activities include the operation of a homicide survivors group in Hartford, Connecticut. Its president, Gary Merton, is the father of a murdered daughter.

Stamford Survivors of Homicide is an unincorporated association of homicide survivors, whose meetings are held in Stamford, Connecticut. Its chairperson, Stuart Brush, is the father of a murdered son.

Parent of Murdered Children of New York State Inc. is a non-profit corporation whose activities include the operation of the Queens County Bereavement Group, the Bronx County Bereavement Group, and the Staten Island Bereavement Group. Its State Coordinator, Ralph Hubbard, is the father of a murdered son.

Long Island Chapter of Parents of Murdered Children and Other Survivors of Homicide Victims is an unincorporated association of homicide victims, whose meetings are held on Long Island, New York. Its president, Barbara Connelly, is the mother of a murdered son.

Albany (Capitol District) Chapter of Parents of Murdered Children and Other Survivors of Homicide Victims is an unincorporated association of homicide victims, whose meetings are held in the Albany, New York, area.

Its president, Patricia M. Gioia, is the mother of a murdered daughter.

Sibling Support and Action Group is an unincorporated association of siblings who are homicide survivors, whose meetings are held on Long Island, New York. Its president, Kathleen Takhes, is the sister of a murdered brother.

Homicide Crisis Outreach Program, based in White Plains, New York, is a division of Westchester Community Opportunity Program Inc., a non-profit corporation. Its coordinator, Marianne Walsh, is the daughter of a murdered father.

The Stephanie Roper Committee, Inc., which appeared as *amicus* in *South Carolina v. Gathers* and *Booth v. Maryland*, is a non-profit corporation based in Upper Marlboro, Maryland, which dedicates itself to the improvement of the standing of crime victims. Its president, Roberta Roper, is the mother of a murdered daughter.

INTRODUCTION AND SUMMARY OF ARGUMENT

Murder is the ultimate act of depersonalization. The murderer turns a sentient being into a corpse, to be remembered at the murder trial by a series of grisly relics: the police photographs, the bloody shirt, the dark stain on the carpet. The crime silences the victim. This Court's unfortunate decisions in *Booth v. Maryland*, 107 S.Ct. 2529 (1987) and *Gathers v. South Carolina*, 109 S.Ct. 2207 (1989)

effectively silence those most capable of articulating the full consequences of the murderer's act: the survivors.

Payne v. Tennessee offers this Court the opportunity to rectify the injustice to crime victims wrought by the decisions of a narrow majority of this Court in *Booth* and *Gathers*. As the facts of *Payne* so poignantly demonstrate, the survivors of a capital crime are themselves victims. They may suffer from depression, anger, or post traumatic stress disorders. They may become dependent on drugs and alcohol. They may become alienated from spouses and siblings. The emotional, physical, and financial consequences they suffer are circumstances of the crime that are properly considered in the sentencing phase of capital, as well as non-capital cases. By unreasonably establishing a *per se* exclusionary rule for victim impact evidence, *Booth* and *Gathers* make it impossible for the sentencing body to weigh and consider the full impact of a capital crime on society.

The United States Constitution does not require the disenfranchisement of victims of capital crimes. Nor does it require that a sentencing body remain ignorant of the personal characteristics of a deceased victim. A capital sentencing body is entitled, if not obligated, to consider the impact of the crime upon its victims. *Amici* join in urging this Court to overrule *Booth* and *Gathers*.

ARGUMENT

I. CONTRARY TO THE MAJORITY HOLDINGS IN *BOOTH V. MARYLAND* AND *GATHERS V. SOUTH CAROLINA*, CONSIDERATION OF VICTIM IMPACT EVIDENCE AT A CAPITAL SENTENCING HEARING, WITH PROPER CONSTRAINTS, DOES NOT TAINT THE FAIRNESS OF THE PROCEEDING.

The majority's decision in *Booth* and *Gathers* proceed from an analytical framework that ignores victim's rights. Under *Booth* and *Gathers*, the only individual rights that deserve consideration at a capital sentencing hearing are those of the defendant. The majority opinions in these cases stress that the capital defendant must be treated as a " 'uniquely individual human being[gl]' " *Booth*, 107 S.Ct. at 2533, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). By contrast, victim impact evidence is "irrelevant to the decision to kill," and "could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime." *Id.* at 2534. Under *Booth* and *Gathers*, the rights of crime victims either do not exist, or do not matter, in the context of capital sentencing.

Amici curiae respectfully submit that the majority in *Booth* and *Gathers* erred in concluding that the only individual rights worthy of considering in capital sentencing are those of the defendant. Victim participation at capital sentencing hearings is not antithetical to the atmosphere of fairness and impartiality that must be maintained in this forum. Nor does giving the trier of fact a "glimpse of the life that [the defendant] chose to extinguish" divert attention from the ultimate question of the defendant's

culpability. *Mills v. Maryland*, 108 S.Ct. 1860, 1876 (1987) (Rehnquist, C.J., dissenting). To the contrary, victim impact evidence provides the sentencer with valuable insight into the impact of the crime on the segment of society most directly and viscerally affected by it: the victim's family and loved ones. This additional insight, absent in a purely defendant-oriented inquiry, permits the sentencing tribunal to make an informed and enlightened decision as to whether the "circumstances of the crime" merit the ultimate penalty of death.

The fault of the majority opinions in *Booth* and *Gathers* lies not in their solicitous concern for the procedural rights of criminal defendants at capital sentencing hearings. This Court has always recognized that cases involving the possibility of the death penalty are different in kind, as well as degree, from non-capital cases. See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion). Similarly justifiable is the Court's concern that a capital sentencing hearing not be tainted by inflammatory, prejudicial testimony from the victim's survivors. "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life shall be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

The majority in *Booth* and *Gathers* errs, however, in concluding that because it is possible that victim impact evidence may taint the necessary atmosphere of fairness at capital sentencing hearings, all victim impact evidence

must be excluded from such hearings as a matter of constitutional law. Certainly inflammatory victim impact evidence has no place at a capital sentencing hearing. The *Booth* majority was justifiably concerned about the prejudicial impact of the victim's son's testimony before the capital sentencing jury that he "'[didn't] think anyone should be able to do something like [the murder of his parents] and get away with it,'" and the victim's daughter's expression of her view that the defendant "'could [never] be rehabilitated.'" *Id.* at 2535, 2536.

Assuring fairness to the convicted capital felon, however, does not require that the representatives of the felon's victim be muzzled. Victim impact evidence is bound to be emotionally powerful; it is unrealistic to expect the survivors of capital crimes to be bland and dispassionate in describing their losses. This Court has recognized a distinction, however, between evidence at a capital sentencing hearing that is *calculated* to evoke a purely emotional response, and proper evidence of mitigating and aggravating circumstances that may incidentally provoke emotional reactions. See *California v. Brown*, 107 S.Ct. 837, 840 (1987). The Court has recognized that a capital sentencing body is not only entitled, but constitutionally required, to consider evidence introduced on a defendant's behalf of "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (emphasis added); *California v. Brown*, 107 S.Ct. 837, 843 (1987) (Brennan, J., dissenting). Just as mitigating factors such as the defendant's youth or troubled family background may arouse a sentencer's compassion, aggravating factors, such as the physical brutality of the crime or

the age of the victim, may arouse revulsion. In neither case does the likelihood of an incidental emotional reaction impermissibly taint the sentencing proceeding.

Victim impact evidence, like other evidence introduced at a capital sentencing hearing, deserves close judicial scrutiny to assure that a death sentence is not imposed out of "whim, passion, prejudice or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). But the need for parameters on the nature and scope of victim impact evidence does not justify the *per se* constitutional ban imposed on such evidence by the majority in *Booth* and *Gathers*. In order to make a "reasoned moral response" to the defendant's crime; *California v. Brown*, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring); the capital sentencing body should be afforded "a glimpse of the life that [the defendant] chose to extinguish." *Mills v. Maryland*, 108 S. Ct. 1860, 1876 (1987) (Rehnquist, C.J., dissenting).

II. THE MAJORITY OPINIONS IN BOOTH AND GATHERS LACK CONSTITUTIONAL FOUNDATION AND USURP THE POLICY-MAKING FUNCTIONS OF THE LEGISLATURE.

Nothing in the text of the Eighth Amendment supports a constitutional ban on victim impact evidence at capital sentencing hearings. Until *Booth*, Eighth Amendment jurisprudence had never required or even supported such a result. As Justice O'Connor stated forcefully in the dissenting opinion in *Gathers*, "*Booth* has not even an arguable basis in the common law background that led up to the Eighth Amendment, in any longstanding societal tradition, or in any evidence that

present society, though its laws or the actions of its juries, has set its face against considering the harm caused by criminal acts in assessing responsibility." *Id.* at 2218 (O'Connor, J., dissenting). In other words, *Booth* and *Gathers* represent judicial policy making cloaked in the mantle of a constitutional mandate.

This Court has recognized that the criminal judicial process must respect the interests of crime victims. *Morris v. Slappy*, 461 U.S. 1, 14 (1983); *Furman v. Georgia*, 408 U.S. 238, 413-14 (1972) (Powell, J., dissenting). It has also frequently recognized that "determinations of appropriate sentencing considerations are 'peculiarly questions of legislative policy.'" *Booth v. Maryland*, 107 S.Ct. 2529, 2539 (1987) (White, J., dissenting), quoting *Gore v. United States*, 357 U.S. 386, 393 (1958). Legislatures across the nation have recognized the rights of crime victims to participate in criminal sentencing. *Nova Legislative Directory*, National Organization for Victim Assistance, Washington, D.C. (1988). The national legislative trend favoring the admission of victim impact evidence at capital sentencing hearings, subject to statutorily-imposed parameters, reflects a considered judgment that such evidence furthers the valid penological goals of deterrence and retribution. See generally *Gregg v. Georgia*, 428 U.S. 153 (1976).

Capital sentencing is more than a referendum on the personal characteristics of the defendant. Properly constituted, it is an expression of the community's judgment on the extent to which the action of the criminal has so harmed his community that the ultimate sanction of death is warranted. The *Booth* majority acknowledged that in a capital case, "it is the function of the sentencing

jury to 'express the conscience of the community on the ultimate question of life or death.' " *Booth v. Maryland*, 107 S.Ct. 2529 at 2533, quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg v. Georgia*, 428 U.S. 153, 184 (1976).

If, as the Court has recognized, the sentencing body is the conduit for the community's response to a capital crime, those members of the community most personally and directly affected by the crime ought not to be silenced at the capital sentencing hearing. The will of the community, as expressed through its legislative bodies, is that victims' survivors should be afforded an opportunity to be heard, in some fashion, at capital sentencing hearings. This Court has the ultimate obligation to assure that the introduction of victim impact evidence does not taint the fundamental fairness of the capital sentencing hearing. In doing so, however, it should limit itself to case-by-case review, rather than proscribing any form of victim impact evidence in the context of capital sentencing.

III. CONSISTENT WITH THIS COURT'S EIGHTH AMENDMENT JURISPRUDENCE, A CRIMINAL DEFENDANT AT CAPITAL SENTENCING SHOULD BE HELD ACCOUNTABLE FOR ALL OF THE CIRCUMSTANCES OF HIS OFFENSE, INCLUDING ITS IMPACT ON VICTIMS.

Fundamental fairness requires that the sentencing body in capital cases take into account "the circumstances

of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937); *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). In applying this principle, this Court has frequently focused on the second half of this phrase: "the character and propensities of the offender." The jurisprudential rule that has evolved is that any aspect of the defendant's character or personal circumstances offered in mitigation of his crime is required to be admitted at the capital sentencing hearing. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604 (1977).

Unfortunately, this Court has offered scant exegesis on what constitutes a "circumstance of the offense" relevant to capital sentencing. It is clear that a capital sentencing body may properly consider aggravating, as well as mitigating circumstances of the offense in deciding whether to impose the death penalty. *Zant v. Stephens*, 462 U.S. 862, 874-75 (1982). Until *Booth*, this Court had never held that as a matter of constitutional law a state legislature could not, "if it chooses, include as a sentencing consideration the particularized harm that an individual's murder causes to the rest of society and in particular to his family." *Booth v. Maryland*, 107 S.Ct. 2529 at 2540 (1987) (O'Connor, J., dissenting). Certainly this harm is not so tenuous or remote that its consideration in sentencing is impermissible as a matter of constitutional law.

The *Booth* majority's rationale for excluding victim impact evidence is that such evidence has no bearing on the defendant's "'personal responsibility and moral guilt.'" *Id.* at 2533, quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982). In making this determination, the majority improperly establishes itself as an arbiter of national

moral standards. The legislative consensus in favor of allowing victim impact evidence to be admitted at sentencing shows that the view of the community, whom the sentencing body represents, is that a criminal defendant does indeed bear "personal responsibility" for the consequences his crime inflicts on victim and victims' survivors.

The *Booth* majority's concept of what bears on a defendant's "moral guilt" is unconscionably narrow. According to the majority, only those factors relevant to "the decision to kill" reflect on blameworthiness. *Id.* at 2534. The *Booth* majority further notes that "defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered." *Id.* While this may be true, should the fact that a killer has no regard for the suffering his act may inflict on the family and loved ones of his victim absolve him from "moral guilt" for these consequences? The *Booth* majority's conception of morality unwittingly condones amorality.

The national consensus in favor of allowing victim input in capital sentencing decisions reflects the moral judgment of society, contrary to that of the *Booth* majority, that people who kill other people should be held morally responsible for the effects of their actions on the victim's survivors. This moral judgment is neither arbitrary nor unreasonable, and should not be overruled by judicial fiat.

IV. THE TEST OF "BLAMEWORTHINESS" SET FORTH IN *BOOTH* AND *GATHERS* IS AMBIGUOUS, AND ITS APPLICATION IMPAIRS THE VALUES OF CERTAINTY AND PREDICTABILITY IN CAPITAL SENTENCING.

In dismissing the argument that the impact of a capital crime on a victim's survivors is indeed a "circumstance of the offense," the *Booth* majority failed to anticipate fact situations such as those in the present case. Here, the victim impact information showed the effect of the crime on a three year old boy who was in the same room where his mother and sister were murdered, and who was himself assaulted in the same attack. As the South Carolina Supreme Court aptly noted:

When a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight year old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his "blameworthiness."

State v. Payne, 791 S.W.2d 10, 19 (1990).

Because *Booth* and *Gathers* turn on the murky philosophical concept of a defendant's moral blameworthiness, they impair the values of certainty and predictability, values which the defendant and the community have an interest in maintaining in the context of capital sentencing. *Furman v. Georgia*, 408 U.S. 283 (1972). It is not difficult to imagine variations on the facts presented to the Court in this case that would confound philosophers, as well as judges, seeking to evaluate the extent to which

a murderer could be held morally culpable for the consequences on his victim's survivors. For example, what if the son had not witnessed his mother's and sister's murders, but had been depicted in a family photograph prominently displayed at the murder scene? Is the defendant morally responsible for the impact of the murders on the child, thus making such impact evidence admissible at a capital sentencing hearing? Would "moral guilt" depend on the prosecution's proof that the defendant actually saw the photograph?

Unfortunately, the admissibility of victim impact evidence now depends on the answers to impossibly close questions such as these. In *Gathers*, the majority found significant the absence of evidence that the defendant had read the religious tracts that his murder victim had carried, noting, among other things, that the defendant did not have a flashlight when he attacked the victim in a dark, wooded area. *Id.* at 2211.

The practical difficulty in defining the scope of "moral guilt" illustrates the fallacy of adjudicating questions of morality. Morality is an issue of public policy, not jurisprudence. The mandate of public policy is that crime victims should be heard at capital sentencing hearings. *Amici* urge the Court to uphold that mandate by overruling *Booth* and *Gathers*.

CONCLUSION

The reality of violent death is discomforting. But for capital sentencing to meaningfully reflect the conscience of society, the full reality of violent death must be

explored. The impact of a capital crime on its victims, and its victims' relatives and loved ones, is as much a circumstance of the crime, if not more so, than the psychological and social factors that the defendant may claim militate against a sentence of death. To ignore victim impact evidence in capital sentencing is to ignore the truth about capital crime. *Amici* join in respectfully requesting the Court to restore truth and fairness to capital sentencing proceedings by allowing the consideration of victim impact evidence.

Respectfully submitted,

Amici Curiae

SALLY S. KING
ROBINSON & COLE
One Commercial Plaza
Hartford, CT 06103-3597
(203) 275-8200
Counsel of Record

RAYMOND T. DEMEO
ROBINSON & COLE
One Commercial Plaza
Hartford, CT 06103-3597

MARIO THOMAS GABOURY
P.O. Box 1780
Bridgeport, CT 06604

PAUL G. GARLAND
130 Old Church Road
Greenwich, CT 06830

Attorneys for *Amici Curiae*